HOMESTEADS and their EXEMPTIONS in WESTERN CANADA

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and their
Exemptions
in Western Canada

BY

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PREFACE

In writing this booklet I have faithfully endeavoured to carry out as closely as possible the views of the publishers. These views aim at the presentation in a small compass of the law of Homestead Exemption as gathered, where possible, from Canadian authority. With that end in view I have adopted the plan of epitomizing the law in headings set in a type darker than that of the body of the book, which consists mainly of cases illustrative of the principle contained in the heading. I have endeavoured to abstain from unnecessary comment, the besetting sin of text writers. This venture upon a path, however circumscribed, as yet untrodden has entailed more labour than the bulk of this booklet may suggest. Only some other first explorer can appreciate the number of doubts and queries that have suggested themselves in making the compilation. Let it suffice that they have been numerous enough to suggest the existence of others which have not revealed themselves to the author. In advance, therefore, I would apologise for what errors there may be in the booklet, and would welcome correction or criticism.

I am indebted to a number of friends, viz., Mr. Justice Stuart, Mr. Justice Beck, Mr. O. M. Biggar, K.C., and Mr. A. U. G. Bury, who have kindly read the proof sheets of the booklet, and given me valuable hints and advice.

WALTER S. SCOTT.

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Homesteads and their Exemptions
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I. GENERAL MEANING OF HOMESTEAD.

A homestead, in general, is a home place (see Imperial Elevator Co. v. Shere 14 W.L.R. 332; Purdy v. Colton 7 W.L.R. 820; John Abell Engine Co. v. Scott 6 W.L.R. 272), a home residence (see Re Claxton 1 Terr. L.R. 282).

The connotation of the term homestead is of a highly elastic nature, its variations in meaning chiefly arising from the effect of statutory provisions. Thus it might mean:

(a) Land acquired by a homestead entry under The Dominion Lands Act.

(b) A 'homestead' not exceeding in size one hundred and sixty acres, and so exempt from execution. (Alberta and Saskatchewan.)

(c) a house and buildings occupied by an execution debtor, and also the lot or lots on which the same are situated according to the registered plan of the same to the extent of fifteen hundred dollars, and so exempt from execution. (Alberta and Saskatchewan.)

(d) land upon which a man (i) or his family actually re-

sides, or (ii) which he cultivates either in whole or in part, or which he actually uses for grazing or other purposes, not exceeding one hundred acres in extent, and so exempt from execution. This exemption carries with it the house, stable, barns and fences on a man's farm (Manitoba).

(e) the actual residence or home of any person, other than a farmer, not exceeding the value of one thousand five hundred dollars, and so exempt from execution (Manitoba).

(f) Homesteads (b) and (c) *supra*, without any restrictions as to value (Saskatchewan, under the provisions of the Homestead Act, SS. 1915, c. 29, and so conferring upon a wife the right to avoid dispositions of the homestead made by her husband).

(g) Land in a city, town or village consisting of not more than four lots in one block, and any other lands to the extent of a quarter section on which the house occupied by the owner thereof as his residence is situated (Alberta, under the provisions of The Dower Act, 1917, and so conferring upon a wife the right to avoid dispositions of the homestead made by her husband).

(h) Parcels of land (up to the value of two thousand five hundred dollars) registered in accordance with the provisions of The Homestead Act (British Columbia, R.S.B.C. 1911, c. 100).

'Homestead' in the older reports will be found with another meaning, namely, that given to it by the Dominion Act, 1874, The Homestead Exemption Act, which was repealed in 1894. (See Re Claxton 1 Terr. L.R. 282 and note thereto by N. D. Beck, Q.C., now Mr. Justice Beck of the Supreme Court of Alberta.)

"Homestead" (a) is outside the scope of this booklet, while "homestead" (f) and (g), being of very re-

cent creation, have as yet gathered round them but little case law. The statutory provisions with regard to them will be found *infra*.

It will be seen that homesteads (b), (c), (d) (i) and (e) all involve both the idea of occupation or residence and the idea of exemption from execution, and accordingly are conveniently treated together. It is true that it is only with regard to homestead (b) that the word is used in the statutory provisions creating the right to exemption, but common usage of the term, the common origin of the exemptions and some statutory authority (see S.S. 1915 c. 29 (The Homestead Act), s. 1) permit the grouping of these four homesteads together, as "the homestead," wherever the context allows. The statutory provisions creating homesteads (b) and (d) seem to be concerned with the needs of the rural community, whilst those creating homesteads (c) and (e) seem to contemplate exemption for the dweller in an urban community, though there seems to be no good reason why they should be regarded as mutually exclusive. "I am inclined," says Wetmore J., in John Abell Engine and Machine Work v. Scott, "to the opinion that par. 10 (The Exemptions Ordinance, s. 2, p. 10, the paragraph creating an "urban homestead") while not limited to such purpose is intended principally to cover the cases of persons residing in cities, towns or villages and having small holdings. As to "homestead" (h) see *infra*.

The expressions "urban" and "rural" homesteads, while perhaps not strictly accurate, are convenient and will, accordingly, be made use of at times in the following pages.

II. SPECIAL MEANING OF HOMESTEAD.

"The Homestead" within the meaning of this booklet is a house and the adjacent land occupied as an actual residence, except where British Columbia homesteads are spoken of.

The cases seem to lay great stress on the necessity for the existence of a dwelling-house and actual occupation thereof, before a homestead can come into existence. It has, however, been held that the placing upon the premises of unhewn logs for the purpose of erecting thereon the humblest cabin, with a bona fide intention to occupy as soon as the cabin can be built, secures the right. (Cameron v. Gebhard, 85 Tex. 610.)

See, however, Imperial Elevator Co. v. Shere *infra* and the remarks of Wheeler, C. J., in Franklin v. Coffee, 18 Tex. 413: "In this case there was no house or home upon the land. He had made no preparation and done no acts which would evince a fixed intention and purpose to select and appropriate the place as a home." It is possible that this case may form the point of reconciliation between Cameron v. Gebhard and Imperial Elevator Co. v. Shere. Elsewhere it is said that actual occupancy and use of the property as a homestead, or a present intention to so use it, coupled with some act indicating such intention, will constitute the property a homestead. (See Wilkerson v. Jones, 40 S.W. 1046 at p. 1047.)

Homestead in the Ordinance is "the enclosure or ground immediately surrounding the mansion or home residence of the debtor." (Per McGuire, J., in re Claxton 1 Terr. L.R. 282.)

A homestead within the meaning of the Exemption Ordinance, as its name imports, is the home-place, the place where the home is, the actual residence of the debtor and his family. It includes not only the dwelling-house, but also the adjoining land occupied and used therewith. (Purdy v. Coulter (On Appeal), 7 W.L.R. 820.)

The word homestead in the Exemption Ordinance does not mean the land acquired by a homestead entry under the Dominion Lands Act, it means the home place, the actual residence of the debtor and his family. It does not in-

clude land upon which the debtor intended to reside, but upon which neither himself nor his family ever actually took up their residence. To render the land exempt from seizure under the execution, there must be actual occupation of it by the debtor and actual residence by him thereon. There must be on the land a dwelling-house in which the debtor lives. (Imperial Elevator Co. v. Shere, 14 W.L.R. 332.)

It has been laid down in a number of cases that the term homestead within the meaning of the Exemption Ordinance, means the home place, the house and the adjacent land occupied as a home, the actual residence of the debtor and his family. John Abell Engine and Machine Works Co. v. Scott, 6 W.L.R. 272; Purdy v. Colton 1 Sask. L.R. 228, 7 W.L.R. 820. The leading and fundamental idea connected with a homestead is unquestionably associated with that of a place of residence for a family where the independence and security of a home may be enjoyed without danger of loss, harassment or disturbance by reason of the improvidence of the head or any other member of the family. It is a secure asylum of which the family cannot be deprived by creditors. The purpose of the Exemption Ordinance being to preserve to the debtor and his family a home in which they can dwell without risk of disturbance from creditors, it follows that to secure the protection of the Ordinance there must be actual occupancy of the place as a home. (Re Hetherington 14 W.L.R. 529.)

The words "the house and building" in par. 10 of s. 52 of The Exemptions Ordinance, means the house, being the residence of the debtor, and the buildings used in connection with such house, hence not a blacksmith's shop. (Eastern Townships Bank v. Drysdale, 6 Terr. L.R. 236, 2 W.L.R. 423.)

Homestead not only includes the dwelling-house, but also embraces everything connected therewith which may

be used and is used for the more perfect enjoyment of the home, such as outhouses for servant or stock or property, gardens, yards or lands to the extent allowed by the Statute. (Ashton v. Ingle, 20 Kan. 670, 27 Am. Rep. 197.)

In British Columbia the legislation relating to homesteads lays stress on registration and not on residence. See The Homestead Act, R.S.B.C. 1911, c. 100 *infra*.

IV. EXTENT OF EXEMPTION.

Homesteads are exempt from seizure by virtue of all writs of execution, in so far as they are within statutory limits. This for rural homesteads is one hundred and sixty acres; and for urban homesteads the value of fifteen hundred dollars. In British Columbia a registered homestead is free from forced seizure, or sale by any process or on account of any debt or liability incurred after the registration, except in so far as the value of the homestead exceeds two thousand five hundred dollars in value. See The Homesteads Act, s. 5 *infra*.

V. AIM OF EXEMPTING STATUTES.

The general object of the statutes granting this exemption from seizure is the safe-guarding of a home.

The intention of the Ordinance is that out of mortgaged property the debtor is to be entitled to, if it can be realized sufficient to provide him with a dwelling-place to the extent of the exemption. (See re Demaurez, 5 Terr. L.R. 84.)

The intention of paragraph 9 was to secure to persons of the farmer class as against their creditors a means of livelihood by which they could support themselves and their families. (Wetmore, J., in John Abell Engine and Machine Works v. Scott, 6 W.L.R. 272.)

The object of paragraphs 9 and 10 of The Exemptions Ordinance was to provide a home for execution debtors, so as to give them shelter beyond the reach of financial misfortune (Eastern Townships Bank v. Drysdale, 6 Terr L.R. 236, 2 W.L.R. 423). The object of the statute seems to have been to secure a habitation to families rather from motives of public policy than the protection of the debtor's property against the claims of his creditors. (Smith v. Brackett, 36 Barb. N.Y. 571.)

The purpose of The Exemption Ordinance was to preserve to the debtor and his family a home in which they could dwell without risk of disturbance from creditors. (Re Hetherington 14 W.L.R. 529.)

VI. CONSTRUCTION OF EXEMPTING STATUTES.

The statutory exemption from seizure being in derogation of the rights of creditors under the general law is to be strictly construed. (Harris v. Rankin, 4 Man. L.R. 135.)

This is not the view taken in many American cases, where the principle is laid down that such acts being remedial should be given a liberal, but natural, construction in favour of the debtor. (In re Fath 132 Cal. 609 and Ward v. Huhn 16 Minn. 169.) So also in Freeman on Executions, s. 208, it is said: "The rule is well supported, and is constantly growing in favour, that exemption laws being remedial, beneficial and humane in their character, they must be liberally construed." Where that rule prevails, it seems that the debtor will be allowed the benefit of the doubt.

From this latter position, however, Taylor, C. J., in London and Canadian Loan and Agency Co. v. Connell, 11 Man. L.R. 151 strongly dissents, and prefers to follow Harris v. Rankin, *supra* and Maxwell on Statutes, p. 350 and p. 96: "Acts which confer exceptional exemption privileges, cor-

relatively trenching on general rights, are subject to the principle of strict construction," and "one of these presumptions is that the Legislature does not intend to make any alteration in the law, beyond what it explicitly declares either in express terms or by unmistakable implication." (See also Kraemer v. Gless, 10 U.C.C.P. 475.) Harris v. Rankin is also followed in re Hetherington, 14 W.L.R. 529. It does not, however, seem impossible that the trend of authority in America towards a remedial construction of these statutes may yet be followed in jurisdictions where, as in Alberta, there is a statutory provision that every provision or enactment thereof shall be deemed remedial. (The Interpretation Act, s. 56 (Alta.).)

While some of the courts, in their earlier decisions, were inclined to give a strict construction to exemption laws, as being in derogation of the common law, it seems now to be a generally accepted rule that, being founded upon considerations of public policy, they are to be construed liberally in favor of their beneficial purposes. Indeed, exemption laws, whatever may be said of their policy, are not in derogation of the common law, but are simply restrictive of statutes passed in derogation of the common law. But however liberal the rule of construction, "courts will not annex to such statutes consequences not fairly within their purview or intent." Washburn on Real Property, s. 544.

VII. EFFECT OF PARTIAL USER.

Neither the user of a portion of the homestead (i.e., the actual residence or home (Manitoba) or "the house and buildings occupied" (Alta. and Sask.)) for business purposes nor the letting of a portion will necessarily disentitle the judgment debtor from asserting a claim to exemption in respect of the whole

building. (Bertrand v. Magnusson, 10 Man. L.R. 490.)

It is not clear whether the "actual residence or home" of (Manitoba) or "the house and buildings occupied" by (Alberta and Saskatchewan) will cover any portion of the premises which is devoted to business purposes. This must necessarily depend upon the views taken by the courts of the general object and scope of the Acts. There is much American authority on both sides. (See 21 Cyc. 478.) One interesting case may be quoted, especially as it gives an attractive definition of the word homestead, i.e., Philleo v. Smalley, 23 Tex. 498, where it was held that a house used as a grocery, in the back room of which the owner slept and kept his trunk, though he took his meals elsewhere was not his homestead, as a homestead is usually the place where the man eats and sleeps surrounding himself with the comforts of a home and enjoying its immunities and privacies.

A building in which is the actual residence and home of a judgment debtor and not worth more than $1500 will be exempt, notwithstanding that the lower storey was built for and wholly used as a general store; and such a building, therefore, will not pass to the assignee by an assignment for the benefit of creditors, "of all his personal property, real estate, credits and effects which may be seized and sold under execution."

The fact that the defendant has rented two of the rooms in the upper storey has not the effect of depriving that portion of the building of its character as a dwelling, built and used as such by the defendant. (Bertrand v. Magnusson, 10 Man. L.R. 490.)

If an owner sublets a portion of a single tenement, he may claim exemption for the whole tenement and it has been held that an owner of two houses in one of which he

lived during the winter and moved into the other during the summer to let the first one was entitled to claim the whole lot and buildings as a homestead (Colbert v. Henley, 64 Miss. 374), but an owner who moved from house to house, according as tenants presented themselves was held not to have acquired a homestead in any of the houses. (Hendrick v. Hendrick, 13 Tex. Civ. App. 49.)

A married woman owned a building subject to a mortgage. She occupied a part of it as a home (her husband living elsewhere), and rented the rest to another for use as a shop. There were separate entrances to the two portions of the building. A judgment was obtained against the married woman, and it was registered. It was held that the portion occupied by the married woman was exempt from seizure or sale, that the portion rented was not exempt, and that the mortgage should be apportioned. (Warne v. Housley, 3 Man. L.R. 547.) See also Brock v. Morton, *infra* p.

VIIa. NECESSITY OF CONTIGUITY.

(*Semble*) **Disconnected land may form a part of the homestead, if habitually used as such in good faith.**

The homestead may consist of two or more separate parcels in some instances, but these parts or parcels must be so near together that they can be occupied and used for the purpose of a homestead. (See Armstrong's Estate, 22 Pac. 79 at p. 80.)

Homestead cannot be construed to include land a mile away from that on which the dwelling is situated, though used in connection with the homestead for supplying wood to the owner's house. (See McCrosky v. Walker, 18 S.W. 169.)

Disconnected land may form a part of the homestead, if habitually used as such in good faith, but it has been held

that the use of a distant lot for pasturage of cattle or for stabling a cow or for family washing is not a user sufficient to incorporate the lot used with the homestead. (Adams v. Jenkins, 16 Gray, Mass. 146, and Achilles v. Willis, 81 Tex. 169.)

A lot used by the owner for raising garden vegetables and fruits for the exclusive use of his family is part of the homestead, though located in a different part of the city from the owner's residence. (Anderson v. Sessions, 51 S.W. 874.)

VIII. ABANDONMENT OF RESIDENCE.

Homestead rights dependent upon residence may be lost by abandonment, i.e., by a removal from the homestead with the intention of acquiring elsewhere a residence which is not merely of a temporary character and which is taken for purposes not consistent with the retention of the original premises as the home, and the claimant of homestead rights, in the case of a temporary absence, must show that the land is still his "residence"; whilst with regard to homestead rights dependent upon cultivation (as in Manitoba) the judgment debtor who ceases from cultivation must show that the cesser of cultivation has occurred for some grave reason and has not continued an unreasonable period. (Re Hetherington, 14 W.L.R. 529, and Brimstone v. Smith, 1 Man. L.R. 302).

The term actual occupancy is not to be understood as requiring constant personal presence so as to make a man's residence his prison, or that a temporary absence enforced by some casualty or for the purposes of business or pleasure would constitute a ceasing to occupy or an abandonment of

the homestead. But where the execution debtor or his family is not living on the homestead claimed as exempt at the time of the seizure, it is *prima facie* not exempt and the onus is cast on the claimant to shew that the land is still within the protection of the Exemption Ordinance. To do this he must shew that the place is still his actual and bona-fide residence, and that his absence therefrom has only been of a temporary character. In other words, he must satisfy the Court that he has not abandoned the place as his home. What constitutes abandonment? It is a removal from the premises with the intention of acquiring elsewhere a residence which is not merely of a temporary character and which is taken for purposes not consistent with the retention of the original premises as his home. The character of the new residence required and the purposes for which it was acquired seem to me to be important factors in determining whether or not the debtor has abandoned the premises claimed as exempt as his actual place of residence. A man might close up his house and go on an extended tour without abandoning his home, or he might move into town to enable his children to attend school during school term, and still preserve his right to hold his homestead exempt. But where a new residence is acquired it must only be a temporary one for a definite purpose, with a constant and abiding intention to return as soon as that purpose is accomplished. The exemption from seizure given by the Exemption Ordinance, being in derogation of the rights of the creditor under the general law is to be strictly construed. Harris v. Rankin 4 Man. L.R. 135, Dixon v. McKay, 12 Man. L.R. 514. (Re Hetherington 14 W.L.R. 529. See also Hart v. Rye, 27 W.L.R. 9.)

Accordingly in this case where a farmer ceased to occupy his own farm in 1907 and took up his residence on a neighbouring farm, influenced by the fact that there was a larger acreage under cultivation on the farm he rented

and that the owner gave him a team of horses to work it with, it was held that his mere statement that he had always regarded the former farm as his home and intended to return to it was insufficient to discharge the onus cast upon him.

The object of the statute seems to have been to secure a habitation to families, rather from motives of public policy than the protection of the debtor's property against the claims of his creditors. (Smith v. Brackett 36 Barb. N.Y. 571.) Substitute for the words "habitation to," the following, "means of support for," and the above passage is fully in accord with the policy of the Act of Manitoba. (The present section of the Manitoba Act is not limited to land cultivated. It demands actual residence, whole or partial cultivation or actual use for grazing or other purposes.) The American authorities seem to indicate that a mere temporary absence even for a considerable period, coupled with the leasing of the premises, will not destroy the exemption. Potts v. Davenport, 7 Ill. 455; Wright v. Dunning 46 Ill. 271; Cipperly v. Rhodes (poverty), 53 Ill. 346; Kenley v. Hudelson, 99 Ill. 493; Bell v. Devore, 96 Ill. 217. But these cases appear to lay down the rule that the intention to return and occupy must clearly be shewn. So, in regard to the exemption under our Act, exigencies might arise preventing the continuous cultivation by the debtor and at the same time he might shew that he intended to resume cultivation. In such case it would seem harsh to deprive him of the protection thrown around the means of supporting his family. It must be kept well in view, however, that our statute requires something to be done with the land in order to support the exemption. The labor of the debtor is requisite, not as in those states I refer to, the mere passive act of residing. It must not be forgotten also, that it is of interest to a community, such as ours, that as much land should be

bought and kept under cultivation as possible, and probably the legislature had this larger object in view as well as the mere personal one of providing means of subsistence for the family. I therefore think the debtor should be held more strictly to the very words of the statute than is done in the case above cited and that in each particular instance of ceasing to cultivate, he must satisfy the court it occurred for some grave reason and has not continued an unreasonable period. (Brimstone v. Smith 1 Man. L.R. 302.)

A judgment debtor gave up his position as Indian Agent at Berens River, and rented the buildings in question, in which he had been living and which he had erected on Crown land, to his successor in office, and built a temporary log house on an island about 1½ miles away in which he lived with his family and where he maintained himself by fishing. He afterwards tried to sell the building in question to the Dominion Government. He swore that his absence was only temporary and that if he could not get the Government to purchase, he intended to return and occupy the buildings as his own. It was held the buildings were not exempt. (Dixon v. McKay 12 Man. L.R. 514.)

Where a debtor had let his homestead for three years to his brother and taken what he thought was a permanent position in the government Post Office Department in Portage la Prairie and remained there for nearly three years—working, however, for his brother on the farm for the whole of one summer—Lamont, J., held that the farm had not continued to be his residence and was not exempt as his homestead. (In re Dallin 17 W.L.R. 557.)

A quarter section of land although all the land owned by an execution debtor is not his homestead within par. 9 of s. 22 of The Exemptions Ordinance, where he has not occupied it for nine years and appears to have no *animus revertendi.* (John Abell Engine and Machine Works, Ltd., v. Scott, 6 W.L.R. 272.)

A removal from the homestead for temporary business purposes will not debar the debtor from his exemption if he continually purposes to return. Hence such absence to engage in trade, or to seek work elsewhere, to raise crops during several seasons on the land of another, to dispose of a stock of goods owned by the wife, to hold an official position, or to secure a more convenient location for the practice of medicine, will not forfeit the homestead. (21 Cyc. 601.)

Where the state of the debtor's health renders it necessary or advisable for him to remove temporarily from his home, the property remains exempt despite such absence. (21 Cyc. 601.)

It has been held that a homestead is not lost where a return is intended when the city in which it is situated attains a certain population, or if the debtor fails to find a new home, or when the children of the homesteader shall marry. (21 Cyc. 603.)

Loss of homestead rights has been held to follow, where the homesteader "emigrated from the state leaving part of his personal property in his former dwelling, but returned several years for supplies and to look after his property."

The mere act of leasing or renting out the homestead temporarily does not necessarily constitute an abandonment, and (*semble*) the rent accruing under such lease would be exempt from execution. (Morgan v. Rountree 88 Iowa 249.)

Abandonment is a question of fact. There must be actual removal with no intention to return. If the removal is temporary and the *animus revertendi* is established and third persons have not been led to believe it was not a homestead by the owner thus out of possession, and to act upon this belief in purchasing or specifically altering their condition, upon the belief that it was not exempt as a homestead, the law would treat the homestead right as still sub-

sisting." "It was laid down very emphatically that to abandon a homestead a party must forsake and leave it with the intent never to return to it again as a homestead. Abandonment must be actual and not merely intentional. After having intended to abandon he may change his mind." (Thompson on Homesteads, quoted in Hockin v. Whellams 6 Man. L.R. 521.) Temporary absence by the party and his family without acquiring another home is not an abandonment of the right. (Potts v. Davenport 79 Ill. 455.)

Where a party left the state to better his condition and being taken sick rented a room in an adjoining state and kept house there with his wife, and so remained about nine months, but always with the intention of returning to his home in Illinois; this was held not to amount to an abandonment of his homestead. (Cipperly v. Rhodes 53 Ill. 340.)

Provision is made for abandonment of a homestead in British Columbia by The Homestead Act, SS. 8 and 9 (see *infra*), with the consent of the wife, if the owner be a married man and his wife a resident in the Province.

IX. RIGHT TO PROCEEDS AFTER VOLUNTARY AND INVOLUNTARY DISPOSITIONS.

It has been held that the exemption of a homestead attaches to the proceeds of a sale or other disposition, if such sale or disposition is involuntary, but where a debtor has voluntarily disposed of a homestead the proceeds are not exempt until re-invested in other exempt property before a creditor has acquired a charge or lien upon them. (Re Demaurez, 5 Terr. L.R. 84; Massey Harris Co. v. Schram, 5 Terr. L.R. 338.)

It seems probable that the same principle would apply to such moneys as damages or compensation for injury to a homestead. (See Kaiser v. Seaton 62 Iowa 463.)

Freeman on Executions, s. 235, p. 1271, states that he has found "no dissent from the proposition that no part of a homestead can become subject to execution through an act to which the claimant did not consent."

On the sale of land under the order of court, part of which is exempt from seizure under executions and mortgages, the debtor, as against his execution creditors is entitled to the full amount of the exemptions allowed him by the Ordinance out of the proceeds of sale after payment of the mortgages. (Re Demaurez 5 Terr. L.R. 84.)

In protecting the homestead of the debtor from seizure under execution, the legislature did not interfere with his right to mortgage it or encumber it, or to deal with it in any way he might choose, without thereby causing it to lose its exempt character, so long as he did not voluntarily convert into property which was not entitled to the protection of the Exemptions Ordinance. (Purdy v. Colton 7 W.L.R. 820.)

Although a debtor has a right to do as he likes with his property which is exempt from seizure, if he voluntarily converts it into other property which is not exempt from seizure, that property would not be entitled to the protection given by the Exemption Ordinance.

If the house on a homestead is burnt down and the owner has it insured, the insurance money is exempt from seizure, and he is entitled to receive the same to restore his home. (Osler v. Muter, 19 O.A.R. 94.)

Mortgage moneys, forming part of the proceeds of the sale of a homestead are not exempt, for where a debtor has **voluntarily** disposed of a homestead, the proceeds are not exempt until re-invested in other exempt property before a creditor has acquired a charge or lien upon them. (Massey Harris Co. v. Schram, 5 Terr. L.R. 338.)

The surplus proceeds after an involuntary or forced

sale under process of law of an exempt homestead still retain their exempt character. The proceeds of chattels, exempt from seizure and sale under execution, voluntarily sold by a debtor are attachable. (Slater v. Rodgers, 2 Terr. L.R. 310.)

Where a writ of execution is filed against the lands of an execution debtor, and the debtor subsequently sells and conveys his homestead to a purchaser, the proceeds of sale are not bound by such writ and can only be reached by some other process. (Seay v. The Sommerville Hardware Co., Ltd., 1 W.W.R. (1917) 1497.)

As to the right to sell in British Columbia, see The Homestead Act. s. 8 *infra*.

X. RIGHT TO INSURANCE MONEYS.

In Manitoba any moneys that may become payable by reason of loss by fire under any policy of fire insurance in respect of a homestead that is exempt at the time of the loss is exempt from seizure under execution or attachment or any other legal process. Upon general principles it would appear that this statement of the law would in general hold good in other jurisdictions.

In Osler v. Muter *supra*, Hagarty, C. J. O., says: Where he insures such goods (i.e., exempted goods) he obtains an indemnity if destroyed by fire, and it appears to be but reasonable that such indemnity when recovered shall stand in the place of the exempted goods, to enable him to replace the articles properly protected by the statute. . . . . We are not concerned with any possible diversion of it for other purposes.

XI. RIGHT OF OWNER TO ENCUMBER HOMESTEAD

The exemption given to homesteads is a protection against seizure by all writs of execution (The Exemptions Ordinance, s. 2; R.S.M. 1913, c. 66, s. 29), and does not disentitle the owner of the homestead to mortgage or encumber it or deal with it in any way he may choose without thereby causing it to lose its exempt character, so long as he does not voluntarily convert it into property which is not entitled to protection. (Purdy v. Colton, 7 W.L.R. 820; Hockin v. Whellams, 6 Man. L.R. 521.) In British Columbia the right to mortgage is expressly given by statute. The right to mortgage is, however, considerably restricted by the statutory provisions requiring concurrence of the wife. (See The Homestead Act (B.C), s. 8, and the Dower Act, Alberta, and The Homestead Act, Saskatchewan *passim*. In British Columbia the exemption is a protection against forced seizure or sale by any process (The Homestead Act, s. 9).

It is thought that although the protection given in the Alberta and Saskatchewan laws is only against writs of execution the Courts would refuse to an execution creditor any relief tending to effect the same results as a writ of execution, e.g., the appointment of a receiver. See Massey Harris v. Schram, 5 Terr. L.R. 338, where no distinction is drawn between a writ of execution and "equitable execution."

As to the appointment of a Receiver not being execution, but merely a substitute for execution. (See re Shephard, 43 C.D. 131, and Norburn v. Norburn, 1894, 1 Q.B. 448.)

The sale of a homestead under a mortgage is a compulsory sale. No sale which is ordered by a Court can be

considered a voluntary one. (Bocz v. Spiller, 6 Terr. L.R. 25.)

In Manitoba the question is settled by the Judgments Act, s. 9, which provides that no proceedings shall be taken under any registered judgment or attachment against exemptions.

As to Mechanics Liens, see Re Demaurez, 5 Terr. L.R. 84.

XII. EXEMPTIONS WHERE LAND MORTGAGED.

Where an urban homestead of greater value than $1500 is mortgaged, the debtor is entitled to throw the whole of the mortgage as against execution creditors upon the non-exempt portion of the land and (*semble*) the onus of establishing a value in excess of $1500 lies upon the attacking creditor. The debtor may (*semble*) where the mortgaged land can be so divided that a dwelling-house and the land necessary for its occupation to the value of $1500 exclusive of the mortgage can be set aside, make application for that purpose; while if the land does not admit of any such division he is entitled to his exemption out of the value of the equity of redemption. (Ontario Bank v. McMicken, 7 Man. L.R. 203, and in re Demaurez, 5 Terr. L.R. 84.) In British Columbia there appears to be no distinction between urban and rural homesteads and the exemption value is two thousand five hundred dollars.

"Where property is mortgaged it is necessary that the equity of redemption should be above the prescribed value to make it chargeable with a judgment debt. It is only the interest of the debtor that is charged. It is only a question of the value of his interest and not of the value of the entire fee simple. It is only to be sold if more than $1500 be

offered for it, which cannot be expected if the equity of redemption be not above $1500 in value." (Ontario Bank v. McMicken, 7 Man. L.R. 203 at 221.)

"If the lot was capable of being divided so that each portion of it would have an appreciable market value after the dwelling-house and lands about it necessary for its usual and proper occupation as such, in all to the value of $1500, exclusive of the mortgages, had been set apart, an application would have been made to have it so divided, and I am not prepared to say that if the lot was capable of being so divided that would not have been the proper course to have taken, but I express no decided opinion upon the subject. . . . . Arriving at the conclusion that the land was not capable of being so divided, I am of opinion that the appellant was entitled to his exemption to the extent of $1500 in respect to the whole lot, and that that right is not affected by the fact that the value of the lot with the buildings were over $1500. A person might have a lot of land, the intrinsic value of which in itself would not be more than $200. He might have buildings on it worth $20,000, and it would be utterly impossible to set aside any portion of the lot worth $1500. But the person would have the right of exemption to the extent of such $1500 if the property was embraced by paragraph 10 of the Ordinance in question. In the case before the Court, while, as I have stated, the total value of the property was over $1500, there were mortgages against it, and as a matter of fact, the equity of redemption was only worth $1530. I agree with what was held in the Ontario Bank v. McMicken, which as I understand it, is substantially "that when the land in respect to which the right to exemption attaches is mortgaged, the debtor is entitled to his exemptions out of the value of the equity of redemption. I think this is in accordance with the intention of the Ordinance, namely, that given such property, the debtor shall be entitled to, if

it can be realized, sufficient to provide him with a dwelling-place to the extent of the exemption. (Per Wetmore, J., in re Demaurez *supra*, followed in Purdy v. Colton.)

There does not seem to be any good reason why the principle that the mortgagor is entitled to an exemption sufficient to provide him with a dwelling-place should not be extended to rural homesteads, but there does not appear to be any authority on the subject. It is difficult to say how far the debtor can make choice of the exact acres which he will claim as his exemption in the event of his owning more than the statutory limit. The Manitoba Exemptions Act, s. 34, lays it down that the judgment creditor shall be entitled to a choice from the greater quantity of the same kind of property or articles which are hereby exempted from seizure, so that in that jurisdiction there is no difficulty except such as arises from the question as to whether the various parts of an exempted homestead must be contiguous or not. The statutory provisions in Alberta and Saskatchewan omit the words "of property or". It can scarcely be contended that land is an article. It is difficult to define this word, but it seems to signify something that is at once moveable and a chattel.

A horse is an "article" within s. 25 Llandaff and Canton District Markets Act, 1858, 21 and 22 Vic. c. cv. (Llandaff Market Co. v. Lyndon, 30 L.J. (M.C.) 105; 8 C.B. (N.S.) 515). Stock in the funds was held not to be included in a bequest of "every other article belonging to me both in and out of my house and which may not be herein mentioned" in Collier v. Squire, 3 Russ. 467. "Any other article or thing" in s. 37 Prison Act, 1865, means any other article or thing of any other kind, sort or description whatsoever, e.g., a crowbar (R. v. Payne, 35 L.J. (M.C.) 170; L.R.C.C.R.I. 27). A ship is not an "article" (Palmer Shipbuilding Co. v. Chaytor, 10 E.S. 177, L.R. 4 Q.B. 209. "Articles, Matters and Things" in a lease indicate moveable chattels (per Erle, C.J., Gar-

ton v. Gregory, 31 L.J.Q.B. 302, 3 B. & S. 90. See Stroud's Judicial Dictionary, p. 119.)

It is true that McGuire, J., in re Demaurez (a case only concerned with real property), says: "I think the law is that the sheriff is bound to leave him what is exempt, the debtor having the right, if he chooses to exercise it, to a choice from the greater quantity of the same kind of articles which are exempted. If he does not see fit to make the choice, it is probable he would not be heard to complain that the sheriff had not made the choice most favourable to the debtor."

In British Columbia the court may make such order as to partition and sale of any portion of a homestead which exceeds in value the sum of two thousand five hundred dollars, and generally as to costs and other matters, with a view to the final adjustment of any question depending between the parties, as to such court shall seem fit. Provided, however, that in the case of the sale of any portion of the homestead of a value exceeding the sum of two thousand five hundred dollars, due regard shall be had to the choice and preference of the owner and parties interested in the portion reserved for sale. (See The Homestead Act (B.C.), s. 10.)

It is suggested that notwithstanding any implication to the contrary that may be capable of being drawn from this dictum, the proper solution of the question is to be found shadowed forth in the decision of Wetmore, J., namely, an application to the court to set aside a portion of the homestead as exempt, which setting aside would doubtless be based on questions of convenience and utility to the debtor and of fairness to the creditors.

XIII. WAIVER OF EXEMPTION BY MORTGAGE.

The debtor having the right to mortgage his property, he to that extent waives his right of exemption,

but it is not an unconditional waiver—it only entitles the mortgagee to subject the property to the satisfaction of his claim in like manner and to the same extent as if it were not exempt; but with respect to other creditors the property is exempt to the same extent as before the mortgage was given. (Bocz v. Spiller, 6 Terr. L.R. 225.)

XIV. WHETHER RIGHT PERSONAL OR NOT.

In Manitoba the right to claim exemption for a homestead appears to be regarded as personal to the debtor, whereas in Alberta and Saskatchewan an opposite view prevails, and there the exemption can be claimed by persons claiming under the owner. (Roberts v. Hartley, 14 Man. L.R. 284, applying the principle laid down in Young v. Short, 3 Man. L.R. (a chattel case); Purdy v. Coulter, 7 W.L.R. 820, and Bocz v. Spiller, 6 Terr. L.R. 225.)

Young v. Short *supra* has since been disapproved by Mathers, C. J. K. B., in Robin Hood v. Maple Leaf, 9 W.W.R. 1453, in so far as execution against chattels are concerned, but Roberts v. Hartley would seem to be still good law in Manitoba as far as homesteads are concerned. See further Bates v. Cannon, 18 Man L.R. 7 *infra*, Temperance Insurance Co. v. Coombe, 28 C.L.J. 88 *infra*, and Ashcroft v. Hopkins, 2 Alta. L.R. 253.

As to the law in Saskatchewan, see further *infra*.

Young v. Short was decided on the authorities quoted in the judgment as follows:—

In Mickes v. Towsley, 1 Cow 114, Towsley brought trespass against Mickes and Matthews, for seizing and selling under execution, against one Whitney. The judgment is thus reported: "It does not lie in the mouth of the defend-

ant to say that any of the sheep were exempt from execution. This is a privilege of which Whitney alone could avail himself. Earl v. Camp 16 Wend 570, was a case in which the plaintiff had taken goods under an attachment, which was held to be irregular. They then tried to set up a mortgage to a third party, which was rejected. They also sought to prove that part of the property was exempt. The Court held that although the property be sold and applied on the execution, the debtor might yet prosecute his action and recover the full value. But it lies with him alone to make the objection and seek the remedy in his own time and his own way. Even his bailee could not sue or defend himself on that ground. "The right to enforce the exemption is personal to himself." Smith v. Hill 22 Barb. N.Y. 656, was an action by the sheriff for the value of goods sold to the defendant under an execution against his brother. At the sale he claimed that they were exempt from seizure, and that question was raised at the trial. The Court held that whether the goods were exempt from execution or not was not a proper question to be agitated at the trial. That was a claim personal to the defendant in the execution, and he only could avail himself of the privilege.

In Young v. Short, 3 Man. L.R. 302, it was distinctly held by the court that, in the case of chattels, the right to claim exemption from execution is personal to the debtor and cannot be set up by his assignee. The same principle seems applicable to land. The debtor has no interest in the land and no right to claim its exemption. But, while the transfer is effectual against him, the land is charged by the registration of the judgment as if the registration were before the transfer. The right to exemption being personal to the debtor only, it cannot be set up by the grantee. Roberts v. Hartley *supra*.

A view similar to that prevailing in Manitoba was taken in Purdy v. Coulter, 6 Terr. L.R. 294, 7 W.L.R. 820, where

it was held that the right to exemption was a personal one in the execution debtor and exerciseable only for the benefit of the debtor or his family, and that therefore where mortgages subsequent to executions would exhaust the whole of the sale price of mortgaged lands so that nothing could come in any event to the execution debtor or his family, a claim of exemption could not be made by such mortgagees nor by the execution debtor on their behalf.

This decision was reversed in Purdy v. Colter, 7 W.L.R. 820, where it was held that the execution debtor could claim the exemption for his mortgagee, but no opinion was expressed as to whether the claim could be made by the mortgagee himself. Prior to the decision in Purdy v. Coulter, Newlands, J., had held in Bocz v. Spiller, 6 Terr. L.R. 225, that an execution against lands does not bind the homestead of the execution debtor, and mortgagees of the land subsequent to the execution are entitled to sell it free from executions (followed in Imperial Elevator Co. v. Jesse, 7 Terr. L.R. 101). This decision was based on the fact that in the Territories a judgment is not a lien upon the land, whatever effect it obtains is through the filing of the execution in the Land Titles Office. Upon appeal to the court *en banc*, the judgment of Newland, J., was sustained, and Wetmore, J., in the course of his judgment, said that a mortgage of a homestead was entitled to invoke the provision of The Ordinance respecting exemptions, because if he had not that right his mortgage might be useless as a security, or its value impeached.

Baker v. Gillum, 9 W.L.R. 436, settles the point left undecided by Purdy v. Coulter *supra, viz.*, that a mortgagee has a right to raise the question that the mortgaged property is not liable to seizure under an execution in so far as his mortgage is concerned.

From the still earlier case of Meunier v. Doray, 6 Terr. L.R. 194, it is clear that some members of the Court were

of the opinion that the right to claim the benefit of an exemption was not confined to the execution debtor, but extended at least to members of his family, and that a wife to whom the land, exempted in the hands of her husband, has been voluntarily conveyed could claim it, though Scott, J., in that case thought that in Alberta, as well as in Manitoba, the right of the grantor might be forfeited by him during his lifetime, and that, in either case, the land would be rendered liable to the claims of his creditors. See also National Trust Co. v. Stancul, 29 W.L.R. 723, 7 W.W.R. 1389.

XV. EFFECT OF REGISTERED JUDGMENT AND FI-FA.

In Manitoba a registered judgment charges all the lands of the judgment debtor in the district in which it is registered, including exempted lands, though the right to enforce the charge remains in abeyance and cannot be enforced against his exempted homestead. (Roberts v. Hartley *supra*; Frost v. Driver and Dickson, 10 Man. L.R. 319.) In Alberta and Saskatchewan, a lien is not created upon an exempted homestead either by a judgment or by the filing of a writ of *fi-fa* in the Land Titles Office (Fredericks v. North-West Thresher Co., 15 W.L.R. 66, and Hart v. Rye, 27 W.L.R. 9. See as to effect of judgment generally in Saskatchewan, Weidman and Weidman v. McClary Manufacturing Co. [1917], 2 W.W.R. 210.)

At the time of the decision in Fredericks v. North-West Thresher Co. *supra*, the Saskatchewan Land Titles Act, s. 118 (2) provided that the writ should bind the land covered thereby only from the time of the receipt of a certified copy thereof by the registrar for the registration district in which such land is situated.

The Alberta Land Titles Act, s. 77, provides that "no land shall be bound by any such writ until the receipt by the Registrar . . . . of a copy thereof.

A subsequent change (c. 16, s. 17, of the Saskatchewan Statutes of 1912-13) provided for the delivery of a copy of the writ of execution to the registrar and that "such writ shall bind and form a lien and charge on all the lands of the execution debtor situate within the judicial district of the sheriff who delivers or transmits such copy as fully and effectually as though the said lands were charged in writing by the execution debtor under his hand and seal from and only from the time of the receipt of the certified copy of the said writ by the registrar for the registration district in which such land is situated."

In Foss v. Sterling, 8 W.W.R. 1092, Elwood, J., in explaining this change said: "In my opinion the amending sub-section to s. 118 does not cause an execution to bind equitable interests any more than equitable interests could have been bound prior to the passing of that amendment. It does, however, affect, for instance, lands that a judgment debtor is the registered owner of, but with respect to which, were it not for the amendment, he would be entitled to claim exemption; and it seems to me that the amendment was passed in view of the many decisions of our Courts on the question of exemption." It is not thought that by this language Elwood, J., meant any more than that the filing of the execution would give birth to a dormant charge, which would spring into life on the land passing into the hands of a vendee, etc., though the language actually used seems open to a wider construction.

However, as Newlands, J., in delivering the judgment of the Court *en banc* in this case (8 W.W.R. 1092) held that the amendment did not affect any lands which the sheriff could not legally seize prior to the passing of it, ("It does not extend his right to seize lands, but only provides what effect

an execution against lands which he could legally seize before it was passed should have. The question, therefore, arises: What is the interest of Wilinoth in the land in question; and next: Can the sheriff seize that such interest; because he must have the right to seize that interest, before the writ can become a lien or charge upon it"), is supposed that the law in Saskatchewan is as stated *supra.*

In National Trust Co. v. Stancul (Sask.), 7 W.W.R. 1389, referring to Roberts v. Hartly and Frost v. Driver *supra* and to the amendment of 1912 to the Saskatchewan Land Titles Act, s. 118, Parker, M., says: "Neither of these cases, however, goes so far as to hold that the same consideration would apply in the case of a sale which is not voluntary on the part of the debtor. While therefore the effect of the above-mentioned amendment may be to modify the law in this province, so as to prevent the debtor from making a voluntary transfer of his homestead free from executions (as to which I do not think it is for me to express any decided opinion, particularly in the case under consideration), it does not in my opinion affect the case of an involuntary or forced sale, under process of law, and the surplus proceeds after such a sale in my opinion still retain their exempt character. I would even go so far as to say that the amendment would not affect a voluntary transfer if made by the debtor to a member of his family. Under the Manitoba Statute and the decisions thereunder it has been held that the right to claim exemption from execution is personal to the debtor and cannot be set up by his assignee, whereas our Act expressly provides that the real and personal property of the execution debtor and his family is exempt from seizure. See remarks of Wetmore, C. J., in Meunier v. Doray, 2 W.L.R. 231 at p. 233."

The Manitoba Judgments Act, s. 3, provides that "from the time of the recording of the same the said judgment shall, except as hereinafter mentioned, bind and form a

lien and charge on all the lands of the judgment debtor in the several districts in the Registry offices and Land Titles Offices of which such certificate is recorded, the same as though charged in writing by the judgment debtor under his hand and seal."

The provisions of the Execution Act (R.S.B.C. 1911, c. 79, s. 27 (1)) are as follows: Immediately upon any judgment being entered or recovered in this province, such judgment may be registered in any or all of the Land Registry offices in the Province, and from the time of registering the same the said judgment shall form a lien and charge on all the lands of the judgment debtor in the several land registry districts in which such judgment is registered, in the same manner as if charged in writing by the judgment debtor under his hand and seal; and after the registering of such judgment the judgment creditor may, if he wish to do so, forthwith proceed upon the lien and charge thereby created.

It may have been the intention of the draftsman of the Saskatchewan Amendment to assimilate the effect of an execution in that province to that of a judgment in Manitoba, but the intention seems to have failed, and the difference in effect between the law in Saskatchewan and Manitoba seems largely to depend upon the fact that in the latter jurisdiction there is a statutory provision from which it can be deduced that exempt homesteads are liable to the statutory lien and charge, though it remains dormant during the retention of the lands by the execution debtor, viz., s. 9 of The Judgments Act, which provides that "unless otherwise provided no proceedings shall be taken under any registered judgment or attachment against exemptions." The word "proceedings" is apparently wide enough to prevent the interest of the judgment debtor in his exempt land being reached by a writ of execution or other process, although the dormant charge or lien still subsists.

The reason for the decision in Frost v. Driver and Dickson is historically explained in the judgment as follows:

"Under the provisions in the Con. Stats., c. 37, s. 83, a registered judgment charged on all the lands of the judgment debtor, whether they were exempt from seizure on a *fi-fa* lands or not: McLean v. Gillis, 2 Man. L.R. 113. Then s. 111 of the Administration of Justice Act, 1885, excepted from the charge of the registered judgment "such real estate as is exempt from seizure under writs of execution, etc.; but at the next session by 49 Vic., c. 35, s. 14, this section was amended by striking out the words "such real estate as it" and substituting therefor the words "that no proceedings in equity shall be taken on any such certificate of judgment against any real estate" as is exempt from seizure under writs of execution. Then by 51 Vic., c. 36, ss. 8 and 10, from s. 111 and s. 117 was amended so as to read: "The following personal estate is hereby declared free from seizure by virtue of all writs of execution issued by any Court in this Province, and no proceedings in equity shall be taken against the following real estate under any certificate of judgment or attachment. There is thus shown, I think, a definite intention on the part of the legislature that the registered judgment shall charge all the lands of the judgment debtor in the district in which it is registered, though the right to enforce the charge or lien remains in abeyance and cannot be enforced against such of his lands as come within the description of lands that are 'exemptions' under s. 12". (The later form of the statutory provisions are given *supra*.)

In Brimstone v. Smith, 1 Man. L.R. 302, Smith, J., explains the provision that homesteads (exempt) are to be free from seizure by virtue of all writs of execution as meaning free from such actual interference by the sheriff as would prejudice the full enjoyment of the exemption, and is of opinion that the creditor would preserve his rights of seizure

and sale suspended only during the continuance of the exemption. Smith v. Brackett, 36 Barb. N.Y. 575; Allen v. Coote, 26 Barb. N.Y. 374, are quoted by him as authorities to this effect.

It is clear that this is not the meaning given to the same words "free from seizure" by the Saskatchewan Court in Fredericks v. North-West Thresher Co. (15 W.L.R. 66; 44 S.C.R. 318, followed in Hart v. Rye, 27 W.L.R. 9.) In that case the law is laid down as follows:

"A sheriff by delivering a writ of *fi-fa* to the Registrar seizes all the debtor's land, but the seizure must be with the exceptions mentioned in the Exemptions Ordinance, and, he being forbidden to seize the homestead of the judgment debtor, that land is not affected by the deposit of the writ and the execution does not become a lien upon it. Inasmuch as the debtor can do what he likes with his exempt property (Field v. Hart, 22 A.R. 449, and re Beatty and Finlayson, 27 O.R. 642), he can transfer his homestead, even after a writ of *fi-fa* has been filed with the registrar and the transferee takes it free from the execution, which he has a right to have removed from his registered title." (Hamilton v. McCuaig, 18 W.L.R. 84.)

I agree with the view taken by Mr. Justice Bain in re Frost v. Driver and Dickson, 10 Man. L.R. 319, that the registration of a judgment creates a lien or charge upon the exempted property, although no proceedings can be taken to enforce the charge so long as the property retains the character which entitles it to such an exemption. The property transferred away was not, then, property to which the creditor could not in any event resort for payment. Whenever it should cease to be of the character necessary to make it exempt, he would be able to proceed upon the judgment against it. If the debtor abandoned it or died, the judgment debtor could proceed. It it should rise in value to over $1500 he

could do so. (Per Killam, C. J., in Roberts v. Hartley, 14 Man. L.R. 284.)

In Manitoba a registered judgment attaches on land acquired subsequently to its registration, and no act of the execution debtor can after the land has become bound by a writ of execution free it from such execution. (Harris v.Rankin, 4 Man. L.R. 135; McLatchie v. McLeod, 6 Man. L.R. 452.)

XVI. CONVEYANCES IN FRAUD OF CREDITORS.

A conveyance of a homestead may be set aside as fraudulent against creditors, where their judgments would, as in Manitoba, form a lien on the exempted homestead, but this is not so, in general, where no lien is created, even although the motive for its execution is bad. (Meunier v. Doray, 6 Terr. L.R. 194; Roberts v. Hartley, 14 M.L.R. 284; McLatchie v. McLeod, 6 Man. L.R. 452; Piper v. Johnston, 12 Minn. 60.)

(*Semble*) If the conveyance of a homestead be set aside, as being in fraud of creditors, it nevertheless remains good as against the grantor, and accordingly the benefit of the homestead exemption is lost.

In order that the statute, 13 Eliz., c. 5, should apply to land, it must at the time of the transfer be subject to execution, and therefore it cannot apply to a homestead within the meaning of The Exemptions Ordinance. (Meunier v. Doray, 6 Terr. L.R. 194.)

If a conveyance of a homestead be made upon a secret trust to hold for the grantor after he has ceased to use the property as a homestead, or in the expectation that the homestead will increase in value beyond the statutory value, then (*semble*) a voluntary conveyance thereof will

be bad as against creditors. (See Bump on Fraudulent Conveyances, 3rd Ed., s. 245, Scheuerman v. Scheuerman, 10 W.W.R. 379; 52 S.C.R. 625.)

Defendant sold land to his father in 1882. Plaintiff recovered judgment against defendant in 1885 for $15,000 and issued *fi-fa* lands. In 1888 a decree declared the deed from defendant to his father fraudulent as against the plaintiff. Immediately after decree the father re-conveyed the land to the defendant to enable him to claim it as exempt from seizure. Until the re-conveyance the defendant lived with his father upon the land as a member of his family only; and the cultivation was by or for the benefit of the father. After the re-conveyance the father lived with the defendant who resided upon and cultivated the land. Held that the land was not exempt from sale under the *fi-fa* The land having once become bound by the writ did not become exempt by the acts of the defendant. (McLatchie v. McLeod, 6 Man. L.R. 452.)

A chattel mortgage, although given under circumstances entitling a creditor to have it set aside as a fraudulent preference under s. 41 of The Assignments Act, R.S.M. 1902, c. 8, will nevertheless be held valid as to any goods covered by it which would under s. 29 of The Executions Act, R.S.M. 1902, c. 58, be exempt from seizure under execution. (Field v. Hart, 22 A.R. 449, followed in Bates v. Cannon, 18 Man. L.R. 7.)

An execution debtor can do as he pleases with the statutory exemptions, and his execution creditor cannot take advantage of the fact that they are insufficiently described in a bill of sale thereof by the execution debtor. (Field v. Hart, 22 O.A.R. 449.)

The debtor has an absolute *jus disponendi* over the exemptions. He is not compelled to keep them in his possession in order that they should retain the character of exemptions. If sold, he is entitled to the proceeds in money,

which he can deal with as he likes; and after his death his widow has the same right as he himself had. At common law a debtor has a right to prefer his creditor. A preference is fraudulent only by virtue of the statute, and the plaintiff cannot be placed in any better position than if the chattels had remained in the debtor's hands. There can be no fraudulent transfer of chattels which in no case could be reached by execution. (Temperance Ins. Co. v. Coombe, 28 C.L.J., 88.)

A chattel mortgage given by a debtor on a wagon which is exempt will not be set aside at the instance of a creditor, even if it is proved that the chattel mortgage was given under circumstances which would except for the exemption constitute a fraudulent preference under the Assignments Act. (Ashcroft v. Hopkins, 2 Alta. L.R. 253.)

Where a husband conveyed his homestead to his wife apparently to protect a possible increase in its value over the statutory limit against the claim of an existing execution creditor, the husband alleging a parol trust was refused relief by the Supreme Court of Canada (Scheuerman v. Scheuerman, 10 W.W.R. 379). Two members of the Court, Fitzpatrick, C. J., and Idington, J., decided the point without direct reference to the Exemption Ordinance, while Duff, J., held that, as the scheme of the transfer was that the wife should hold the land as long as the debt to the judgment creditor remained unpaid, the hindering of the creditor was necessarily involved in the event of the value of the property reaching a point at which the surplus would become properly exigible, whether the parties had in mind a possible advance in value or not and that the husband had not discharged the onus of showing that the creditor was not in fact delayed. Brodeur, J., held that the intent of the husband was to defeat the creditors when the property would become of sufficient value to become liable to seizure, following Kettleschlager v. Ferrick, 12 S.D. 455, where it

was held that a transfer of the homestead from husband to wife without consideration to prevent creditors from subjecting such premises to the satisfaction of their claims in case the debtor should remove therefrom was fraudulent as to creditors. (See also Taylor v. Ferguson, 87 Texas 1, Baynes v. Baker, 60 Texas 139, and Barker v. Doylon, 28 Wis. 367.) Anglin, J., held, on the other hand, that it was the value and condition of the property at the date of the transfer which must determine its exigibility and that to hold that a subsequent change in occupation or increase in value should be taken into account would introduce an element quite too speculative and would unsettle titles and defeat the purpose of the statute (Sims v. Thomas, 12 A. & E. 536, and Willoughy v. Pope, 58 Sol. Rep. 705). The transfer by a debtor of property exempt from seizure, says Anglin, J., is lawful, and cannot harm his creditors, and therefore cannot be fraudulent against him. Matthews v. Feaver, 1 Cox 278, Story's Equity, s. 367, Rider v. Kidder, 10 Ves. 360, Nichols v. Eaton, 91 U.S. 716. However evil the mind and intent of such a debtor may be, he is amenable only *in foro conscientiae*. The plaintiff's intent was fraudulent, his act was not. Day v. Day, 17 A.R. 157, Symes v. Hughes, L.R. 9 Eq. 475, Taylor v. Bowers, 1 Q.B.D. 291, Cloud v. Meyers, 136 Ill. App. 45, Palmer v. Bray, 98 N.W. Rep. 849.

The argument that, because the creditor claims that the conveyance is void as against him, he cannot say that the property is transferred away from the debtor, is at first sight plausible. And if it appeared that the transfer was colorable only and the property held upon a secret trust for the debtor, the latter could probably claim the benefit of the exemption for his equitable interest. But here both husband and wife unite in asserting the reality of the transfer. The answer to the argument is that the transfer is

effectual to divest the debtor of his property, but not to free it from liability to be subject to judgment or execution." (Roberts v. Hartley *supra.*)

If a debtor absolutely conveys all his interest in his exempted land, by a conveyance, valid and binding on him, even when set aside by the Court as against creditors, his claim for exemption will fail. (See Huey's Appeal, 29 Pa. St. 219.) (Brimstone v. Smith, 1 Man. L.R. 302.)

Where property is conveyed in ignorance of the right to exemption to another in order to preserve it for the grantor, when suit is brought against him, the latter though he has converted his title into an equitable one, does not lose his right to exemption, where he continues to hold and reside on the land.

"Even if," says Perdue, J., "he has sought by colorable means to obtain a protection which the law unknown to him had already conferred upon him. I see no reason for concluding that he has lost the right given to him by the statute, by reason only of the means he adopted. Placing the property in the name of a trustee for the debtor would not injure the present rights of the creditor, as long as the trusteeship is admitted. If the premises are once dedicated as an exemption, it is immaterial to the creditor whether the land is held by a trustee or not. The creditor would, however, in case the land stood in the name of a trustee, be entitled to a declaration that the premises were still the property of the debtor, so that, if the exemption should at any time elapse, the judgment might be enforced against the land." (Logan v. Rea, 14 Man. L.R. 543.)

The prevalent view of assignments of a homestead alleged to be fraudulent in U.S.A. seems to be that set out in Freeman (On Executions) at p. 1287, s. 239: "It follows from the fact that a homestead is not subject to attachment or execution that a judgment debtor cannot, by any conveyance or other disposition which he may make of it, pre-

judice his creditors, or give them any just cause for complaint. If they show that his conveyance was infected by actual fraud, because his object was to hinder, delay or defraud them, they do no more than to establish that it ought not to be employed against them for the purpose of depriving them of any remedy, which, but for such conveyance, they might have. This only makes their rights and remedies the same as if no transfer had been attempted; and, as in the absence of the attempted disposition, the creditors had no right to subject the property to execution, they derive no additional right from the fraudulent transfer, and the homestead property is still beyond their reach."

No equity arises in favour of creditors, whose judgments are not a lien on the homestead to have the assets marshalled as against one having a specific lien on the homestead, Washburn on Real Property, s. 603.

It is not a fraud on creditors for a debtor to use personal property which is subject to legal process to acquire or improve a homestead which is exempt. Washburn on Real Property, s. 603.

In saying, as many of the cases do, that the statute 13 Eliz., c. 5, applies only to such property as can be taken in execution, this expression must be taken as equivalent to property that can be compulsorily applied to the payment of the debts of the grantor, whether by execution or otherwise. (Brimstone v. Smith, 1 Man. L.R. 302, followed in Roberts v. Hartley, 14 Man. L.R. 284.)

XVII. WAIVER OF EXEMPTION.

In Manitoba the waiver of exemption from seizure is forbidden by statute, in Alberta and Saskatchewan there are no analogous provisions and, upon principle in the absence of statutory provision to the contrary there seems to be no good reason why an immediate

waiver should not be effective in those jurisdictions. As in the case with the loss of homestead rights, the burden of proving a waiver should lie upon the person asserting the same.

Every agreement to waive or abandon an exemption from seizure or a benefit, right or privilege of exemption from seizure under this act and every arrangement, contract or bargain, verbal or written, under seal or otherwise, made or entered into with or without valuable consideration, whereby an attempt is made to prevent any person from claiming the benefit, right or privilege of exemption under this act shall be absolutely null and void. Provided, however, that this section shall not give rise to any inference or implication that such agreement, arrangement, contract or bargain was not heretofore void. (R.S.M. 1913, c. 666, s. 29.)

A waiver of homestead rights by competent parties is generally permitted, as they are deemed personal privileges. It has been held, however, that the homestead right cannot be waived by contract in advance of the occasion of asserting such right; such a contract of waiver being against public policy. 21 Cyc. 611.

See the provisions of The Homestead Act (B.C.) as to abandonment (*infra*). This paragraph, as many others, must of course be read subject to the provisions of The Homestead Act (Sask.) and The Dower Act (Alta.) *infra*.

XVIII. LOSS OF EXEMPTION BY ESTOPPEL.

A judgment debtor may be estopped from asserting that land is his homestead, where he has made representations to the contrary. The contrary has, however, been held in Alberta.

It has been held in U.S.A. that if premises are openly and obviously used for residential purposes a statement

under instrument that the property is not a homestead or even an affidavit to that effect made to secure a loan will not estop the maker of the statement or affidavit from claiming exemption (Evans v. English, 10 S.W. 626; Texas Land Co. v. Blalock, 18 S.W. 12, Thompson Saving Bank v. Gregory, 82 S.W. 802), but otherwise the statement or affidavit will, in favor of the person acting on faith of it, act as an estoppel. (Equitable Mortgage Co. v. Norton, 10 S.W. 301.)

A business was carried on upon a town lot in a store building worth $200 by two partners, one of whom owned the lot and resided in another building built in at the back of the store building on the same lot, worth $200. The firm became insolvent and the owning partner leased the whole lot and buildings to a third person, but reserved the right to live in the back addition, and continued to keep her furniture there, leaving the place for long periods in search of work and for other causes. Prior to the dissolution of the partnership the husband of the owning partner and manager for the partnership had obtained credit from the plaintiffs on the strength of credit statements to mercantile agencies to the effect that the lot and buildings were not exempt from execution. After action brought, the owning partner transferred the lot, etc., to a trustee for two infant grandchildren, for whom she had obtained an protection order. It was held that the lot, etc., was a homestead and that it was impossible to make property exempt by statute non-exempt by the application of the doctrine of estoppel. (Brock v. Morton, McCarthy, J., Jan. 18, 1917, not reported. See also Bateman v. Faber, 67 L.J. (Ch.), 130.)

In order to obtain credit from a machine company E. and C. signed an endorsement on the back of the agreement for sale to the following effect: "To obtain credit, as indicated in the within order, I hereby certify that I own in my own name and right" certain land. It was represented to the agent of the machine company that E. owned the

land, but as a matter of fact it stood in the name of C., her husband. After the delivery of the machinery E., in accordance with the agreement, signed a lien on the land to secure the notes given for the purchase price of the machinery in the presence of C., and on his representation that she was the owner of the land. It was held that C. was estopped from denying that the land in question was his wife's and from claiming it as land owned and occupied by him and exempt from proceedings under a registered judgment. (John Abell Engine Co. v. Hornby, 15 Man. L.R. 450.)

XIX. DEATH OF OWNER.

In Alberta and Saskatchewan the exempt homestead of a deceased execution debtor is exempt from seizure under execution against his personal representatives, if it is in the use and enjoyment of the widow and children or widow or children of the deceased and is necessary for the maintenance and support of any of them, but in Manitoba the exemption does not continue after death, so as to prevent an order for sale of the homestead being made in favour of a creditor, who recovers a judgment against the executor, and that although the widow and children are resident upon the land. In British Columbia, if the owner of a homestead dies intestate (a) leaving a wife and children, the homestead passes to the widow to be held by her during the minority of the children, or while she remains unmarried; (b) leaving a widow and no children, the homestead passes to the widow absolutely; (c) leaving children only, the homestead passes to the children in equal shares, and is divisible upon the youngest child attaining the age of 21 years. There is also an express provision forbidding sale by the personal representative. (The

Exemption Ordinance, s. 5; The London and Canadian Loan and Agency Co. v. Connell, 11 Man. L.R. 115; The Homestead Act, B.C., *infra.*)

In Alberta and Saskatchewan there does not appear to be anything requiring an actual or personal residence on the homestead by the widow or children enjoying the exemption, and it is thought that any use might be sufficient to support the exemption, e.g., for the storage of furniture. (See Brettum v. Fox, 100 Mass. 234, and also Holbrook v. Wightman, 31 Minn. 168.)

It should be noted that a surviving husband does not seem to have any rights as to exemption similar to those of a widow.

The word "child" in an act of Parliament always applies exclusively to a legitimate child. (Per Pollock, C. B., in Dickenson v. N. E. Railway, 12 W.R. 52.)

A trust for maintenance and education does not by implication cease at 21, but is frequently one for life. (See Bayne v. Crowther, 20 Beav. 400, and Wilkins v. Jodrell, 49 L.J. (Ch.) 26.)

Education is included in the phrase maintenance and support as applied to children. (Re Breed, 45 L.J. (Ch.) 191.)

A homestead in the occupation of and necessary for the widow and children of a deceased person are not assets with which an administrator has power to deal, except, at any rate, subject to their rights.

The proceeds of sale of such a homestead must be held to be exempt from liability for the debts of the deceased and applicable to the exclusive use of the beneficiaries. (Re Conlin Estate, 7 W.W.R. 187.)

With respect to this last case it may be said that in some States in America, after the death of the family, the premises cannot be sold until they entirely lose their homestead

character, whilst in others a sale is permitted subject to the rights of occupancy by survivors, the sale becoming effective when the occupancy terminates.

The decision of Stuart, J., in the Conlin case seems not to be based so much on the wording of the ordinance as on the fact that a homestead cannot be considered assets in the hands of an administrator not being "property which could before the intestate's death have been made available either in a court of law or a court of equity for the payment of his debts." From the opinion that only such property can be treated as assets, the writer ventures respectfully to dissent. The familiar instance of property subject to a general power of appointment which is exercised by will and so becomes assets of the testator is perhaps a sufficient refutation of the statement. Moreover, a homestead can be made available for certain debts in its owner's life time, e.g., mortgage debts, judgment debts for alimony, debts of an absconding debtor, and (*quaere*) crown debts. There is no general exemption from liability for debt. It would seem to be easier to support the judgment on the ground suggested earlier in his judgment by the learned judge, viz., that "execution" in s. 5 of the Ordinance has a wider meaning than "writs of execution" in s. 2, or on the still wider grounds that the court would not permit the administrator to do for a creditor, that which a creditor would be unable to do for himself by securing a judgment and proceeding to execution. It should be noticed, however, that the seizure from which the property is exempt is "seizure under execution **against** his personal representative." It is difficult to see how these words can be made to cover "sale in course of administration **by** a personal representative," except upon the principle last mentioned.

In re Tatham, 2 O.L.R. 343, Meredith, C. J., held that goods of a deceased husband exempt from seizure under the Execution Act, R.S.O. 1897, c. 77, were not, except as

to funeral and testamentary expenses, assets in the hands of his executors for the payment of debts, the effect of s. 4 of that Act being to give his wife a parliamentary title thereto.

Sec. 4 of the Act is as follows: "The chattels so exempt from seizure as against a debtor shall, after his death, be exempt from the claims of the creditors of the deceased, and the widow shall be entitled to retain the exempted goods for the benefit of herself and the family of the debtor, or if there is no widow, the family of the debtor shall be entitled to the exempted goods."

"It is true," says Meredith, C. J., "that the Act in which the section is found is 'An Act respecting Executions,' and the exemption so far as the debtor himself is concerned, is one from seizure under execution; but the language of s. 4 is much wider. After the death of the debtor, the exempted chattels are to be "exempt from the claims of creditors of the deceased,' and to permit the personal representatives of the deceased to apply them in payment of the debts of the deceased would manifestly defeat the object and purpose of the Act. The words 'entitled to retain' are not very well chosen, but when read with the subsequent part of the section, it is reasonably plain that they are used as the equivalent of 'be entitled to.' "

The case of re Tatham is also of interest in that it seems to shew that a devise by a testator of his lands *simpliciter* would not put his widow or children to their election between their statutory interest in the homestead and the provision made by the will for their benefit.

Sec. 4 of The Dower Act, Alta., *infra*, which limits a life estate to the widow in the "homestead" within the meaning of that Act which may or may not correspond wholly or partially with the "homestead" within the meaning of the Exemption Ordinance, may postpone the difficulty suggested in re Conlin until the death of the widow. This sec-

tion may, too, give rise to curious questions of election. See also the provisions of The Homestead Act (Sask.), s. 8 (*infra*), which fails to notice that the homestead of that Act and that of the Exemptions Act are not necessarily co-terminous. See also the more lucid provisions of the B.C. Homestead Act, s. 7 (*infra*), which aims at making provision for both widow and children, but leaves the latter very much at the mercy of their mother, as it does not appear to constitute a trust in their favour, though measuring the interest of the mother by their minority.

In Rush v. Rush, 22 N.Z.L.R. 249, decided under the Testators' Family Maintenance Act, there is a suggestion that, under somewhat similar circumstances to those arising in re Conlin, the position of a widow both in morals and law differs from that of adult children.

XX. IS THE EXISTENCE OF A "FAMILY" NECESSARY?

In most States of U.S.A. a homestead can only be reserved to a family and is most frequently secured to the head of the family, the interest terminating upon the dissolution of the family. It does not seem that this is so in Canadian jurisdictions, though in Alberta and Saskatchewan the wording of the statutes and the stress laid by some judges on the intent of the various acts to make provision for a family, lends some support to the possible view that a family is a condition precedent to a homestead right.

It might be suggested that unless it was intended that the right of exemption should be so limited to a person with a family, the introduction of the words "and his family" in the beginning of the section: "The following real and personal property of an execution debtor and his family is hereby declared free from seizure by virtue of all writs of

execution" is entirely meaningless. The family would be as well protected without the introduction of the words "and his family" in that place. If it be that the property is that of the execution debtor, but that the exemption is conferred by the family, so that the property, spoken of at the beginning of s. 2, is really the actual articles, etc., when, and only when, owned by a debtor, who can be spoken of in a composite fashion, as an execution debtor and his family, i.e., plus a family, the existence of the words is comprehensible. There does not appear to be any decided case upon the subject, so, though the better view seems to be that a family is not a *sine qua non*, it has been thought well to refer to the following American and English authorities as to the meaning of the word:

"The family may be composed of a brother and sister, a husband and wife, a father or grandfather and his children or grandchildren, a son and his mother or sister, a father-in-law and his dependent daughter-in-law, an unmarried man and his illegitimate offspring, an unmarried woman and her adopted child, a husband and his children, deserted by the wife, and mother, a widower and his adopted daughter and her husband, a divorced man living with his minor unmarried son, a son living with his widowed mother and supporting her, a widow living with and supporting the children of her deceased husband by a former wife. . . . A 'family' does not consist of but one person, nor of a man and a woman unlawfully married, nor of persons lawfully residing together, but without being related or in any wise connected." (21 Cyc. 466.)

The employment of servants is not sufficient to render their employer the head of a family (in re Lampson 2 Hughes 233.)

The actual personal presence of the debtor's family as resident with him upon the land is not necessary, as his domicile is ordinarily deemed to be theirs; but if he leaves

his family in another state with no intention of bringing them to him, he is not the head of a family within the meaning of the homestead laws. Nor is he such if the future removal of his family into the state of his residence is wholly uncertain. (21 Cyc. 470.)

The primary legal meaning of "family" is not equivalent to familia or famille, but means "children" (per Jessel, M. R., in Pigg v. Clarke, 45 L.J. Ch. 849). On the other hand, Kindersley, V. C., has described it as a word of a most loose and flexible description (see Green v. Marsden, 1 Drew 651.) It was held to include "wife" in Blackwell v. Bull, 5 L.J. (Ch.) 251, and to mean "descendants" generally in Williams v. Williams (20 L.J. Ch. 280), and to mean "relations" in Snow v. Teed (39 L.J. Ch. 420).

In most states the exemption of a homestead or other property from liability for debts can be claimed only by the head of a family, but in Georgia it may be claimed by any aged or infirm person, by any trustee of a family of minor children, or by any person on whom any women or girls are dependent for support; and in California, although the head of a family may claim exemption for a homestead valued at $5,000, any other person may claim a homestead valued at $1,000. A few states exempt no homestead, e.g., Maryland. To some debts the exemption does not usually apply; the most common of these are taxes, purchase money, a debt secured by mortgage on the homestead and debts contracted in making improvements upon it. If the homestead belongs to a married person, the consent of both husband and wife is usually required to mortgage it. Finally, some states require that the homestead for which exemption is to be claimed shall be previously entered upon record, others require only occupancy, and still others permit the homestead to be designated whenever a claim is presented. (N. D. Meerness in E.B., v. 13, p. 369.)

XXI. WHO MAY CLAIM THE EXEMPTION.

In Manitoba a partnership firm cannot claim several exemptions for each partner, but only one exemption for the firm out of the partnership property. In Alberta and (*semble*) in Saskatchewan the exemptions granted to a debtor and his family by the Exemptions Ordinance has no application to a partnership. (R.S.M. 1913, c. 66, s. 32; McKinnon v. Beals [1917], 1 W.W.R. 1328.)

An alien friend resident in the Territories is entitled to the benefit of the provisions of the Exemption Ordinance, notwithstanding the provisions of the Naturalization Act. R.S.C. (1886), c. 113, s. 3. (In re Demaurez, 5 Terr. L.R. 84, per Richardson, J.)

Our liberal exemption legislation was doubtless enacted with a view to encouraging immigration, and immigrants from foreign countries were welcome as well as those coming from the older provinces of Great Britain. (Per McGuire, J., in re Demaurez, 5 Terr. L.R. at p. 107.)

A wife may claim exemption for her separate homestead. (Warne v. Housley, 3 Man. L.R. 547.)

The words "actual residence or home," exclude the implication of law that the home and domicile of a married woman are her husband's. (Warne v. Housley, 3 Man. L.R. 547.)

Although it has been decided in U.S.A. that two separate homesteads can not be claimed for the same family (Cornish v. Frees, 74 Wis. 490), and also that where a husband has claimed a homestead, the wife cannot secure another in her separate property during her husband's life. (Swearington v. Bassett, 66 Tex. 267), the wording of the various Canadian statutes would seem to make it clear that there is no prohibition upon the number of homesteads which may be claimed within the ambit of a family.

XXII. A HOMESTEAD RIGHT IS NOT AN ESTATE.

The homestead right of a judgment debtor does not appear to amount to what may be properly called an estate. It has been well described as a quality annexed to land, whereby an estate is exempt from sale under execution for debt. (Thomas v. Fulford, 117 N.C. 667.)

"The right of homestead is purely the creation of statutes, which have no extra territorial force. It is generally spoken of as an estate in land and treated as an estate for life or an estate by marriage. But it is submitted that, while the homestead right possesses some of the incidents of an estate, it is rather a protection to an estate than an estate itself. For, as will be shown, it is the policy of homestead laws to extend this protection to any estate which the homesteader has in the land, even a chattel interest. It protects the homesteader's estate against forced sale in favor of creditors, but affords no protection to his title as against paramount claimants. Nor, in general, is the right dependent upon marriage. Generally, the estate is absolute in favour of the homesteader's alienee, and frequently by express provision it extends, as against the homesteader's creditors, to his heirs (Can. wife and children), whether they, in their own right are entitled to claim homestead rights or not. It will generally be found, however that, while the homesteader may convey the homestead free from the claims of his creditors, if he dies entitled to homestead, the rights of creditors attach, but are postponed in favour of the widow and minor children. In a few states the lien of a judgment will attach to the land, the enforcement of the judgment being merely postponed in favour of the occupation of the land by the homesteader in favour of his surviving wife and minor children. Nowhere is the exemption

a protection against claims for purchase money and taxes." (Washburn on Real Property, s. 540.)

XXIII. QUANTITY OF INTEREST NECESSARY TO SUPPORT HOMESTEAD.

The interest which will support a homestead right may be legal or equitable, freehold or leasehold, and, indeed, apparently any interest which does not fall short of a naked right to possession.

The interest of the judgment debtor which will protect the homestead from seizure under a writ of execution must apparently be a present as distinguished from a future or contingent interest in the land, and a real interest as distinguished from a mere possession, e.g., that of a grantor who has conveyed his property by a conveyance declared to be fraudulent as against creditors. The case of a man claiming as his exemption land that does not belong to him and in which he has no interest, is one that is altogether outside the scope and intention of the statute. (Massey Harris Co. v. Warener, ,7 C.L.T. Occ. N. 409.)

The interest may apparently be a freehold or leasehold interest, an estate in fee simple or for life, a lease for years, from year to year or a tenancy at will (but not (quaere) a tenancy on sufferance), a legal interest or an equitable interest such as that of a purchaser under a contract for sale. It seems clear that the right of such a purchaser would be good as against creditors other than the vendor of the land, who, e.g., make application for the appointment of a receiver by way of equitable execution. The provision in R.S.M. 1913, c. 65, s. 37, clearly entitles the vendor of real estate to proceed upon a judgment for the purchase moneys of the homestead, as if no exemptions existed, but it is surmised that in Alberta and Saskatchewan the provision of

s. 4 of the Ordinance fails by reason of the word "articles" to protect the vendor of land in a similar way in those jurisdictions.

The difference in the statutes can scarcely, however, be of much practical importance, as a vendor ordinarly possesses more effectual remedies against a purchaser than that to be obtained by an action for the purchase moneys, e.g., rescission of the contract, ejectment, declaration of a vendor's lien enforced as an equitable remedy, etc.

See also Manitoba Judgments Act, R.S.M., c. 107, s. 13.

"Nothing herein contained shall be construed to protect from a registered judgment or attachment or from being sold thereunder any property the purchase price of which is the subject of the judgment or attachment proceeded upon, and to the extent to which it is so the subject."

If it be correct to say that a mere permissive occupant of land has no right to homestead exemption, the statement is of great importance (see Taylor v. Prendergast, 29 S.W. 87), where it was held that a permissive occupant of land, having no legal or equitable title, cannot claim a homestead therein or in machinery thereto attached and dealt with by the debtor as personalty.

Occupancy of premises by a debtor, although he claims them as a homestead, will give him no rights as against either the holder of a paramount title or one who would otherwise be entitled to possession. So according to weight of authority such occupancy gives him no right of homestead as against creditors, although the contrary view is maintained in some jurisdictions. (21 Cyc. 504.)

It is essential, however, to the right of homestead that the debtor have such an interest in the property as may be sold on execution to pay his debts. (Jones v. Jones, 213 Ill. 228.)

A mere tenancy at will or from year to year has been held sufficient to support the homestead right (King v. Stur-

gess, 56 Miss. 606), although the weight of authority is against this view. (Jones v. Jones, 213 Ill. 228; 21 Cyc. 504.)

XXIV. EFFECT OF ASSIGNMENT FOR BENEFIT OF CREDITORS IN GENERAL WORDS.

An assignment for the general benefit of creditors in general words, e.g., "all my personal property and all my real estate, credits and effects which may be seized and sold under execution" (Assignments Act (Alta.), s. 6), may and should be filed in the Land Registry, and the assignee is entitled to be registered as owner of all the lands of the assignor, at any rate, in the absence of objection from the assignor, inasmuch as the registrar cannot know anything of the exemptions of the debtor. It has been held in Saskatchewan (Leach v. Haultain, 24 W.L.R. 154, 4 W.W.R. 484), that in such a case, where the assignee has made application and been registered, the Court may, where the assignee has not been registered, and apparently as long as the title remains in the assignee, make a declaration that such and such land is the homestead of the debtor. (See the special provisions of the Saskatchewan Land Titles Act permitting the debtor to claim his exemptions within 30 days of filing the assignment.)

XXV. PROTECTION AGAINST COMPENSATION UNDER WORKMEN'S COMPENSATION ACT.

A painter employed to paint a homestead is precluded from recovering compensation for injuries by the provisions of s. 10 of The Workmen's Compensation Act (Alta.), which excludes from the operation of the Act the employment of agriculture and *inter*

alia **any work performed about a farm or homestead for farm purposes or for the purposes of improving such farm or homestead. (Smid v. Townsend, 8 W.W.R. 474.)**

XXVI. POINTS OF PRACTICE AND PLEADING.

A *fi-fa* goods must be returned before sale under *fi-fa* lands, but not necessarily before a decree can be made to enforce the statutory lien given by registration of a judgment.

Upon a motion for final judgment for the sale of land under a registered certificate of judgment, the plaintiff must plead in his statement of claim or show by an affidavit that the lands sought to be sold are not exempt as a homestead. (Re Marshall Wells v. Kaey, 4 W.W.R. 1192, per Curran, J.)

While an exempted homestead is still in the hands of its owner against whom executions have been registered, the Court will not grant a declaratory judgment declaring that the homestead is free from the executions. (Gilmore v. Callies, 19 W.L.R. 543, followed in Trottier v. National Manufacturing Co., 22 W.L.R. 615.)

It is the duty of a registrar to treat an execution against lands as a charge upon the execution debtor's lands with priority according to the date of registration; he is not bound to ascertain and determine whether the execution debtor is entitled to claim for his land exemption from execution, that is for the court to decide. (Re Love and Bilodean, 22 W.L.R. 689.)

The transferor of a homestead is under an implied undertaking upon giving the transfer to do all things necessary to enable the transferee to obtain title free from cloud by reason of executions, and therefore where a registrar has refused to register the transfer of a homestead, except subject to the writs of execution on record against the trans-

feror, the transferor is the proper party to apply for an order directing the registrar to register the transfer and issue a title to the purchaser free from any cloud by reason of the executions. (Re Hiscox, 4 W.W.R. 770, Alta.)

An execution creditor is entitled to lodge his execution in the Land Titles Office, and is under no obligation to go to any expense to prevent it appearing as a charge against any property standing in the name of the execution debtor, which could only, by reason of extraneous facts, be shewn not to be properly a charge. In such a case the whole burden of proof and expense lies upon the execution debtor. In a simple case, if clear proof is presented to the execution creditor, by affidavit or otherwise before action, that land apparently affected was not really so, he will be bound, at the expense of the execution debtor to do what is necessary to remove the cloud. (Per Beck, J., in Hart v. Rye, 27 W.L.R. 9.)

A convenient method of establishing the right to a homestead exemption is provided in Alberta by means of an originating notice. (See Rule 432 (d).)

THE EXEMPTIONS ORDINANCE (Alta. and Sask.)

2. The following real and personal property of an execution debtor and his family is hereby declared free from seizure by all writs of execution:

. . . . . .

(9) The homestead, provided the same be not more than one hundred and sixty acres; in case it be more the surplus may be sold subject to any lien or encumbrance thereon;

(10) The house and buildings occupied by the execution debtor and also the lot or lots on which the same are situate according to the registered plan of the same to the extent of fifteen hundred dollars.

3. The execution debtor shall be entitled to a choice

from the greater quantity of the same kind of articles which are hereby exempted from seizure.

4. Nothing in this Ordinance shall exempt from seizure any article except for the food, clothing and bedding of the execution debtor and his family, the price of which forms the subject matter of the judgment upon which the execution is issued.

5. In case of the death of the execution debtor, his property exempt from seizure shall be exempt from seizure under execution against his personal representative if the said property is in the use and enjoyment of the widow and children or widow or children of the deceased and is necessary for the maintenance and support of the said widow and children or any of them.

6. The provisions of Section 2 hereof shall not apply to any case where the debtor has absconded or is about to abscond from the Territories, leaving no wife or family behind, nor to an execution issued upon a judgment or order for the payment of alimony.

REVISED STATUTES OF MANITOBA, 1913, c. 66.

29. Except as otherwise by any Act provided, the following personal and real estate are hereby declared free from seizure by virtue of all writs of execution issued by any Court in this Province, namely:—

(h) the land upon which the judgment debtor or his family actually resides, or which he cultivates either wholly or in part, or which he actually uses for grazing or other purposes:

Provided the same be not more than one hundred and sixty acres; in case it be more, the surplus may be sold, subject to any lien or encumbrance thereon.

(i) the house, stable, barns and fences on the judgment debtor's farm, subject, however, as aforesaid;

(k) the actual residence or home of any person, other than a farmer, provided the same does not exceed the value of one thousand five hundred dollars; and if the same does exceed the value of one thousand five hundred dollars, then it may be offered for sale, and if the amount offered after deducting all costs and expenses, exceeds one thousand five hundred dollars, such property shall be sold, but the amount to the extent of the exemption shall at once be paid over to the said judgment debtor and such sum until paid over to the judgment debtor shall be exempt from seizure under execution, garnishment attachment for debt or any other legal process; and no such sale shall be carried out or possession given to any person thereunder until such time as the amount of exemption shall have been paid over to the judgment debtor.

30. Any moneys that may become payable by reason of loss by fire under any policy of fire insurance in respect of any property that is at the time of such loss exempt under this Act from seizure, shall be exempt from seizure under execution or attachment or any other legal process.

32. A partnership firm cannot claim several exemptions for each partner, but only one exemption for the firm out of the partnership property.

33. The exemptions in this Act mentioned cannot be claimed by or on behalf of a debtor who is in the act of removing with his family from the Province, or is about to do so, or who has absconded, taking his family with him.

34. The judgment debtor shall be entitled to a choice from the greater quantity of the same kind of property or articles which are hereby exempted from seizure.

37. Nothing here contained shall be construed to exempt from seizure any real or personal estate mentioned in paragraphs (a), (c), (e), (f), (g), (h), (i), (j) and (k) of

Section 29 of this Act, the purchase price of which is the subject of the judgment proceeded upon either by way of execution or certificate of judgment or attachment.

38. No sale of any farm or garden crops, whether grain or roots, shall take place until after the same have been harvested or taken or removed from the ground.

41. Every agreement to waive or abandon an exemption from seizure or a benefit, right or privilege of exemption from seizure under this Act and every arrangement, contract or bargain, verbal or written, under seal or otherwise, made or entered into with or without valuable consideration, whereby an attempt is made to prevent any person from claiming the benefit, right or privilege of exemption under this Act, shall be absolutely null and void. Provided, however, that this section shall not give rise to any inference or implication that such agreement, arrangement, contract or bargain was not heretofore void.

(NOTE.—R.M. 1913, c. 107, s. 9 (c) makes the same provision as c. 66, s 29 (k) *supra*, but before the words "no such sale" at the end of the latter sections, adds: "Provided that no such sale shall be made unless the amount offered, shall after deducting all costs and expenses exceed one thousand five hundred dollars and that".)

THE DOWER ACT (Alberta, 1917, c. 14)

1. This Act may be cited as *"The Dower Act."*

2. In this Act, unless the context otherwise requires—

The expression "homestead" shall mean—

(a) Land in a city, town or village, consisting of not more than four adjoining lots in one block, as shown on plan duly registered in the proper Registry office in that behalf, on which the house occupied by the owner thereof as his residence is situated;

(b) Lands other than referred to in clause (a) of this section on which the house occupied by the owner thereof as his residence is situated, consisting of not more than one quarter section;

(c) The expression "disposition" shall include every transfer, sale, mortgage, and every other disposition by act *inter vivos* and every devise or other disposition made by will.

3. Every disposition by act *inter vivos* of the homestead of any married man whereby the interest of such married man shall or may vest in any other person at any time during the life of such married man or during the life of such married man's wife living at the date of such disposition shall be null and void unless made with the consent in writing of the wife aforesaid.

4. Every disposition by will of such married man and every devolution upon his death intestate shall, as regards the homestead of such married man, be subject and postponed to an estate for the life of such married man's wife hereby declared to be vested in the wife so surviving.

5. The residence of a married man shall not be deemed, for the purposes of this Act, to have been changed unless such change of residence is consented to in writing by the wife of such married man.

6. Any consent required for the disposition *inter vivos* of such homestead, or for the purpose of establishing a change of residence under this Act shall, whenever any instrument by which such disposition is effected is produced for registration under the provisions of *The Land Titles Act*, be produced and registered therewith. Such consent may be embodied in or endorsed upon the instrument effecting such disposition.

7. When a wife executes any instrument concerning any disposition or consent under this Act she shall acknowledge the same, apart from her husband, to have been executed

by her of her own free will and accord and without any compulsion on the part of her husband.

(2) Such instrument may be made before any person authorized to take proof of the execution of instruments under section 103 of *The Land Titles Act*, and a certificate thereof in form A to this Act shall be endorsed on or attached to the instrument so executed by her.

8. *The Married Women's Home Protection Act*, being chapter 4, Statutes of Alberta, 1915, is hereby repealed.

9. This Act will not apply to any disposition of property already provided for by agreement in writing.

10. This Act shall come into force on the first day of May, 1917.

FORM A.

ACKNOWLEDGEMENT OF WIFE.

This document was acknowledged before me by..... apart from her husband, to have been voluntarily executed by her, and she has further acknowledged that she was aware at the time of such execution of the nature of the contents thereof.

Dated at....., in the Province of....., this.....day of....., 19.....

.....

(*Title of Officiating Officer.*)

THE HOMESTEAD ACT (Saskatchewan, 1915, c. 29)

The word "homestead" in this Act shall mean a homestead under the provisions of paragraphs 9 and 10 of Section 2 of The Exemptions Act:

Provided that a homestead under said paragraph 10 shall not be restricted in value to $1,500.

Every transfer, agreement of sale, lease or other instrument intended to convey or transfer any interest in a

homestead, and every mortgage or incumbrance intended to charge a homestead with the payment of a sum of money, shall be signed by the owner and his wife, if he has a wife, and she shall appear before a district court judge, local registrar of the supreme court, registrar of land titles or their respective deputies or any justice of the peace, and, upon being examined separate and apart from her husband, she shall acknowledge that she understands her rights in the homestead and signs the said instrument of her own free will and consent and without compulsion on the part of her husband;

Provided that, in case an examination is taken outside Saskatchewan such examination shall be taken and acknowledgment made before such officer or person as may be appointed by the Lieutenant-Governor in Council.

3. Every such transfer, agreement, lease, mortgage, incumbrance or other instrument shall contain a declaration by the wife in Form A in the Schedule to this Act, that she has executed the same for the purpose of relinquishing her rights to the homestead.

4. There shall be annexed to or indorsed on the transfer, agreement, lease, mortgage, incumbrance or other instrument, a certificate to be signed by the officer taking the same, to the effect that he has examined the wife separate and apart from her husband, that she understands her rights in the homestead and that she signs such instrument of her own free will and consent and without any compulsion on the part of her husband. Such certificate shall be in Form B in the Schedule to this Act.

5. Every transfer, agreement of sale, lease or other instrument intended to convey or transfer an interest in land, and every mortgage or incumbrance, which does not comply with the provisions of the last two preceding sections shall be accompanied by an affidavit of the maker in Form C in the Schedule to this Act either that the land described in

such instrument is not his homestead, or that he has no wife.

(2) Where the wife of the owner is living apart from her husband under circumstances disentitling her to alimony, or as a lunatic or person of unsound mind, a judge of the Supreme Court may, on the application of any person interested, by order to be made in a summary way and upon such evidence as to him may seem meet, dispense with the signature and acknowledgment of the wife, upon such terms and conditions as may appear just.

(3) Where the wife is a lunatic or person of unsound mind, notice of every such application shall be served in the manner provided by the rule of the Supreme Court for the service of writs of summons on a lunatic or person of unsound mind.

(4) Upon such order being filed with the registrar of land titles, and upon payment of the proper fees, the register shall register the transfer, agreement, lease, mortgage, incumbrance or other instrument in the same manner as if this Act had not been passed.

(2) If the party executing such instrument is acting under a power of attorney, he may, if acquainted with the facts, make the said affidavit in lieu of his principal.

(3) No transferee, mortgagee, incumbrancee, lessee or other person acquiring an interest under any such instrument shall be bound to make enquiry as to the truthfulness of the facts alleged in the affidavit herein provided to be upon delivery of an instrument purporting to be completed made or in the certificate of examination in Form B, and in accordance with this Act, the same shall become valid and binding, according to its tenor save as in Section 7 hereinafter provided.

6: The wife of the owner of a homestead may file a caveat to protect her rights in the same. Such caveat may be in Form D in the Schedule to this Act, and shall be filed free of charge.

(2) The rights in her husband's homestead conferred upon a wife by this Act shall cease upon the filing in the proper land titles office of an assignment for the general benefit of the husband's creditors, unless within thirty days after the mailing by the registrar of the notice hereinafter provided she shall file a caveat in Form D against the land claimed as a homestead.

(3) Every assignment for the benefit of creditors shall be accompanied by an affidavit of the assignor stating whether or not the assignor has a wife, and if he has a wife giving her name and address.

(4) If, upon the filing of such an assignment it appears from the accompanying affidavit that the assignor has a wife, the registrar shall notify the wife by registered letter of such filing and that her rights in her husband's homestead will cease at the expiration of thirty days from the mailing of the notice unless in meantime she files a caveat in Form D against the land claimed as a homestead.

7. Knowledge on the part of the transferee, mortgagee, incumbrancee or lessee that the land described in such instrument is the homestead of the party making the same and that he has a wife who is not a party thereto, shall be fraud, and in an action by the wife any such instrument or the certificate of title issued thereon to any person affected by such fraud may be set aside and cancelled.

8. On the death of the owner of a homestead the same shall vest in his personal representative, subject to the provisions of Section 5 of The Exemptions Act, and during the time said homestead is exempt from seizure under execution, as provided by said Section 5, and notwithstanding any provision in the last will and testament of said owner. The foregoing provisions of this Act shall apply *mutatis mutandis* as if the personal representative were the owner and the widow (if the owner have left a widow) were the wife of such owner, and the declaration and certificate to accom-

pany the transfer, lease, mortgage, incumbrance or other instrument, as the case may be, shall be to the same effect as the declaration and certificate provided for in sections 3 and 4 and the affidavit of the transfer to be furnished to the registrar where the circumstances require it shall be to the same effect as the affidavit contained in Form C.

FORM A.

I, wife of the above named do hereby declare that I have executed this for the purpose of relinquishing all my rights to said homestead in favour of

FORM B.

I, , Judge of the District Court for (or as the case may be), do hereby certify that I have examined , wife of the owner in the within (or annexed) separate and apart from her said husband, and she acknowledges to me that she signed the same of her own free will and consent and without any compulsion on the part of her husband and for the purpose of relinquishing her rights in the homestead in favour of , and further that she was aware of what her rights in said homestead were.

FORM C.

I, of , in the Province of Saskatchewan (*description*) make oath and say as follows:—

1. I am the tranferor (lessor, mortgagor or incumbrancer (*or as the case may be*) *or* the agent acting under power of attorney in my favour, dated the day of granted by the transferor (lessor, mortgagor or incumbrancer, *or as the case may be*) named in the within transfer (lease,

mortgage or incumbrance, *or as the case may be*), and I say that no part of the said land is my homestead (or the homestead of the transferor, lessor, mortgagor, or incumbrancer, *or as the case may be*).

Or

1. I am the transferor (lessor, mortgagor or incumbrnacer, *or as the case may be*) *or* the agent acting under power of attorney in my favour dated the day of , granted by the said transferor (lessor, mortgagor or incumbrancer, *or as the case may be*) and I say that I have (or such transferor, lessor, mortgagor or incumbrancer, *or as the case may be*, has) no wife.

Sworn before me at
in the Province of
this day
of 19 .....

.....

Registrar, Commissioner (*or as the case may be*)

FORM D.

To the Registrar:

Take Notice that I, A.B., of , in the Province of Saskatchewan, wife of C.D., of the same place (description), claiming a right to (here describe the land and refer to the certificate of title) on the ground that such land is the homestead of the said C.D., forbid the registration of any transfer or other instrument affecting such land or the granting of a certificate of title thereto except subject to the claim herein set forth.

My address is:

Dated this day of 19

.....

Signature of Caveator or her agent.

I, the above A.B. (or M.N., agent for the above A.B.), of (residence and description) make oath and say:

1. That the allegations in the above caveat are true in substance and in fact, to the best of my knowledge, information and belief.

Sworn before me at
in the Province of
this day
of 19 .....

.....

Registrar, Commissioner (or as the case may be).

THE HOMESTEAD ACT (R.S.B.C, 1911, c. 100)

2. Homestead means and shall include the pieces or parcels of land, together with any erections or buildings thereon, whether leasehold or freehold, or both leasehold and freehold, with their rights, members and appurtenances which shall be duly registered as a homestead in manner hereinafter mentiond; and any erection or building or any such homestead as aforesaid, whether or not the same be affixed to the soil, shall be taken to be real estate and part of such homstead.

Debtor shall include the personal representative of the debtor, if the debtor be dead, and shall also, in case of the absence of the debtor, include any member of his household.

3. Nothing in this Act contained shall be construed as exempting any real or personal property from sale by taxes or from distress for rent.

(The owner of the homestead must procure registration of his title and also cause a notice of registration to be filed in the land registry office of the district in which the homestead is situated, and a statutory declaration that his clear assets are not less in value than $2,500, or, the homestead being of less value than $2,500, that his clear assets are not less than the value of the homestead. With such notice and statutory declaration, the homestead cannot be registered.)

5. A homestead, after the same shall have been duly registered, shall be free from forced seizure, or sale by any process for or on account of any debt or liability incurred after the registration of such homestead in manner aforesaid:

Provided, however, that in case such homestead shall at the time of such suing out of process be of greater value than two thousand five hundred dollars, then so much only of such homestead shall be liable to seizure or sale as aforesaid as shall exceed the sum of two thousand five hundred dollars.

7. (1) If any person holding a homestead shall die intestate, leaving him surviving a widow and minor children, the homestead of the value aforesaid shall wholly pass to such widow, to be held by her during the minority of such children, or while the said widow remains unmarried; and the exempted property shall not be sold during such minority, or while such widow remains unmarried, for the payment of any debt which shall have been contracted by any such deceased person subsequent to the due registration of such homestead.

(2) If any person holding a homestead shall die intestate—(a) leaving a widow him surviving and no children, the widow shall be entitled to the homestead absolutely; (b) leaving children only him surviving and no widow, the property shall belong to such children absolutely in equal shares, divisible upon the youngest child attaining the age of twenty-one years.

8. Nothing herein contained shall be held to prevent the person for whose benefit a homestead shall be registered at any time from abandoning, aliening, mortgaging, otherwise parting with, limiting, or incumbering his interest therein, as to him may seem fit, regard being had to the nature, quality and incidents thereof, and of his power to dispose of the same: Provided, however, that in case the

owner of any homestead be a married man, he shall not during coverture so abandon, alien, mortgage, part with, limit or incumber the same, except with the consent of his wife, if she be a resident of the Province, such consent to be given by way of acknowledgment by her in the manner provided for in cases of the execution of instruments affecting real estate within the Province by married women; but in case such wife be not a resident no such consent shall be requisite.

9. Any homestead, and the benefits and privileges conferred upon any person or persons under this Act in respect of any homestead, may be abandoned by document.

10. The court may make such order as to partition and sale of any portion of a homestead which exceeds in value the sum of two thousand five hundred dollars, and generally, as to costs and other matters, with a view to the final adjustment of any question depending between the parties, as to such Court shall seem fit: Provided, however, that in case of the sale of any portion of the homestead of a value exceeding the sum of two thousand five hundred dollars, due regard shall be had to the choice and preference of the owner and parties interested in the portion reserved for sale.

14. The provisions for taking the acknowledgements of married women under the Land Registry Act shall apply to taking the consent of married women required in this Act.

15. The registration of any homestead under the provisions of this Act shall be utterly void and of no effect, and all the benefits of this Act shall be forfeited, if any declaration of matters required or permitted to be declared shall be false to the knowledge of the person effecting the said registration, or on whose behalf the same shall be registered.

THE EXECUTION ACT (R.S.B.C., 1911, c. 79)

40. No proceedings shall be taken under any registered judgment against any lands exempt from forced seizure and sale under the provisions of the Homestead Act or against pre-emption claims.

THE PUBLIC LANDS ACT (Ontario)

S. **45.** (2) After the issue of the letters patent, and while the land or any part of it, or any interest in it is owned by the locatee or his widow, heirs, or devisees, the same shall during the twenty years next after the date of the location be exempt from attachment, levy under execution, or sale for the payment of debts, and shall not be or become liable for the satisfaction of any debt or liability contracted or incurred before or during that period, except a debt secured by a valid mortgage or charge of the land made after the issue of the letters patent.

S. **47.** On the death of the locatee, whether before or after the issue of the letters patent, all his then interest and right in the land shall descend to and become vested in his widow during her widowhood in lieu of dower, but the widow may elect to have her dower in the land in lieu of this provision.

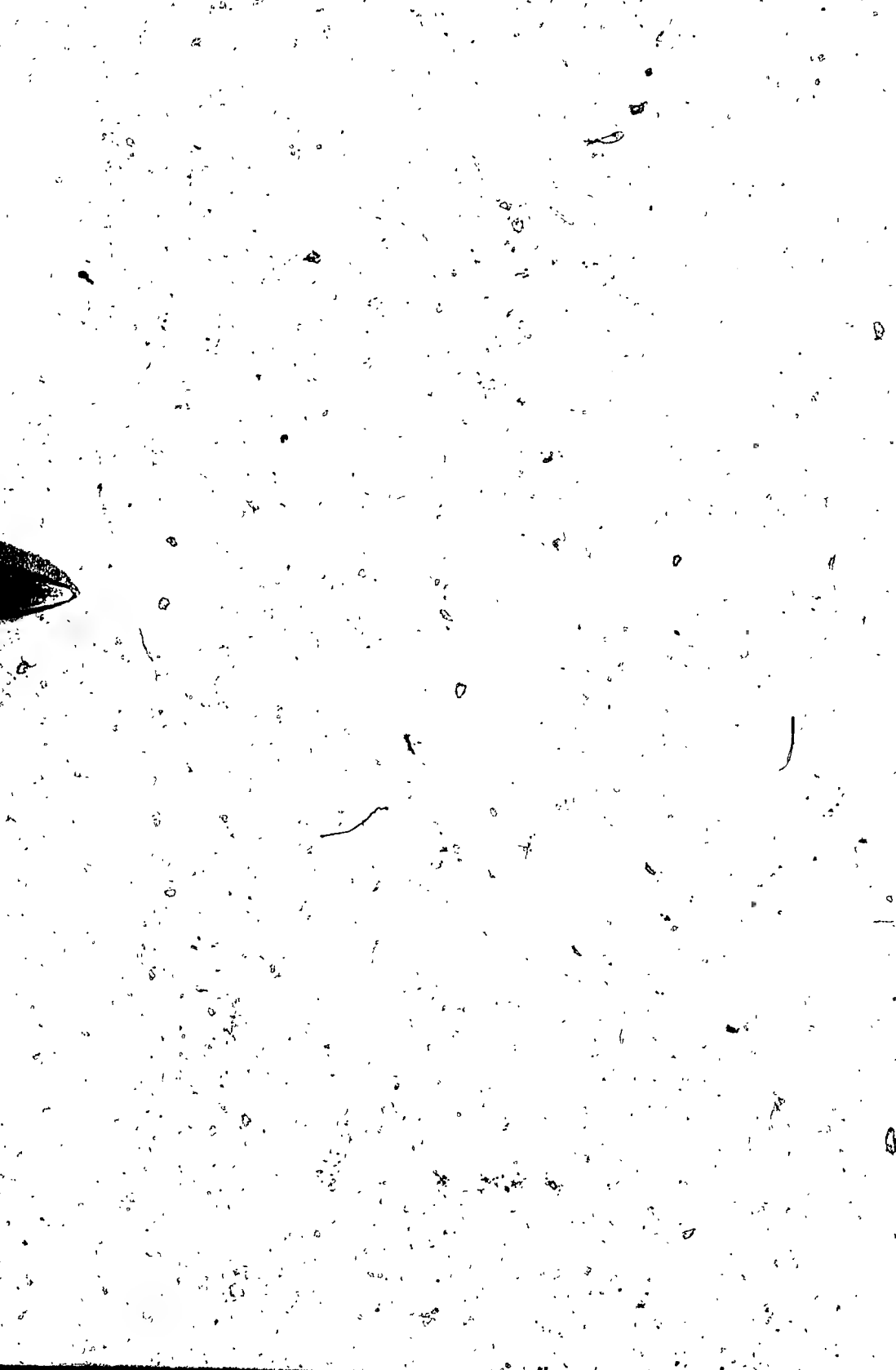
An execution against the land of a patentee under the Free Grants and Homesteads Act, R.S.O., 1887, c. 25, and judgment for a debt incurred before location of the lands, does not operate as a charge against the lands when sold by his devisee, even after the expiry of twenty years from the date of the location. (Re Beatty and Finlayson, 270 O.R. 642.)

The defendant was locatee of certain lands under the Free Grants and Homesteads Act, R.S.O., 1887, c. 25, and duly obtained patents therefor. Afterwards he and his

wife sold and conveyed parts of the land, he taking back mortgages to secure the purchase money:

Held that the mortgages were not interests in the land exempt from levy under execution within the meaning of s. 20, ss. 2. The exemption extends to the land or any part thereof or interest therein, so long as it is held by the original location title, whether before or after patent; but where there has been a valid alienation, a mortgage taken by the original locatee does not vest in him qua locatee. The word "interest" used in the subsection does not extend to the chattel interest of a mortgagee. (Cann v. Knott, 19 O.R. 422, 20 O.R. 294.)

TABLE OF CASES CITED



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